Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

vs.

MARKO BOSKIC,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

Max D. Stern
(Counsel of Record)
Alexandra Deal
Stern, Shapiro, Weissberg
& Garin, LLP
90 Canal Street, 5th Floor
Boston, MA 02114
(617)742-5800

QUESTION PRESENTED

Whether petitioner's statements, which were elicited through consciously misleading and deceptive government conduct, were obtained in violation of petitioner's due process rights.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Marko Boskic respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above proceeding on October 22, 2008.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reprinted in the Appendix hereto (cited as "App. __a") at 1a, infra. See also United States v. Boskic, 545 F.3d 69 (1st Cir. 2008).

The Memorandum and Order of the United States District Court for the District of Massachusetts denying petitioner's Motion to Suppress has not been reported, and is reprinted in the Appendix hereto at 57a, infra.

JURISDICTION

The decision of the Court of Appeals was entered on October 22, 2008. App. 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the petitioner's right to due process under the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any

> person be subject for the same offense to be twice put in jeopardy or life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

STATEMENT OF THE CASE

Petitioner Marko Boskic was indicted on September 24, 2004, on five counts of making false statements. App. 11a, 57a. All of the statements at issue pertained to petitioner's history of military service and participation in the bloody ethnic conflict that took place in the former Yugoslavia between 1992 and 1995. See App. 11a n.6.

Petitioner filed a Motion to Suppress Evidence in the United States District Court for the District of Massachusetts[1/] on March 7, 2005, on the grounds that statements he made to federal investigators during a staged "immigration interview" in August of 2004 were obtained in violation of his Fourth, Fifth and Sixth Amendment rights. App. 12a. The trial court (Woodlock, J.) denied the motion. See App. 116a.

[1/] The district court had jurisdiction pursuant to 18 U.S.C. §3231.

On July 12, 2006, following a nine-day jury trial, petitioner was convicted on Counts I and II of the indictment, alleging violations of 18 U.S.C. §1546(a), and acquitted of the remaining counts. App. 13a. On November 20, 2006, petitioner was sentenced to a term of 63 months in prison and three years of supervised release. App. 13a-14a. He filed a timely notice of appeal. On October 22, 2008, the Court of Appeals for the First Circuit affirmed petitioner's conviction.[2/] See App. 56a.

Background

Petitioner is a Bosian-Croat who left his country for Germany in 1995 following the ethnic conflicts in the Balkans. App. 58a. In 2000, after living in Germany for a time, petitioner took steps to immigrate to the United States. See 3a. The convictions from which he submits this petition arose out of answers he provided on two immigration documents regarding his military service history. See App. 11a n.6. On both of the documents petitioner indicated that he served in the Yugoslav National Army, but omitted his service in the Army of the Republic of Srpska. Id. The government indicted petitioner on the basis that the omissions constituted false statements. See App. 2a.

The Investigation

In the fall of 2002, the Joint Terrorism Task

[2/] The First Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

Force ("JTTF") opened an investigation of petitioner. App. 4a-5a. The JTTF is composed of representatives from numerous agencies of the federal and state governments including Immigration and Customs Enforcement ("ICE"), the State Department, the Federal Bureau of Investigation ("FBI"), the military, the United States Attorney's Office, and state and local police. App. 4a, 59a. FBI agent Greg Hughes was assigned to the investigation in August, 2002, and ICE Agent Thomas Carroll was assigned to the investigation in December, 2003. Id. It was their assignment to investigate whether petitioner had committed "immigration fraud." App. 60a. One of their objectives was to "determine whether Boskic had performed additional undisclosed military service in Bosnia." Id. Specifically, they were investigating whether petitioner made materially false statements on his Application for Refugee Status and his Application to Become a Resident Alien when he did not reveal his participation in the Bosnia-Serb 10th Sabotage Detachment of the Army of the Republika Srpska during the Bosnian conflict in 1995. App. 4a, 60a.

In late December 2003 or early January 2004, JTTF representatives contacted Peter McCloskey, a prosecutor for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), to request ICTY's "help" with their investigation. App. 60a. Alistair Graham, who had been investigating alleged war crimes in Northern Bosnia, was assigned to assist the JTTF with its criminal investigation of

petitioner. Id. Through his work as an ICTY investigator, Graham had collected evidence that identified petitioner as a member of the 10th Sabotage Detachment of the Army of the Republika Srpska. App. 4a, 60a.

In December of 2003, Agent Carroll learned that, in 2002, petitioner filed an application for travel documents with ICE (at the time, the Immigration and Naturalization Service) and ICE had never acted on the application. App. 61a. Some time thereafter, Agent Carroll, Agent Hughes and AUSA Kimberly West devised a plan whereby petitioner would receive a notice to appear at the JFK Building – a federal building in downtown Boston, Massachusetts – for an interview concerning travel documents. App. 5a, 61a. In its Memorandum and Order denying petitioner's Motion to Suppress Evidence, the district court (Woodlock, J.) found that "[t]he government agents had no intention of issuing travel documents to Boskic. Rather, their true purpose was to interview Boskic in connection with their ongoing investigation about his history prior to coming to the United States." App. 61a.

On August 9, 2004, the government sent petitioner a notice to come to the JFK Building on August 25, 2004, at 3:30 p.m., for an interview regarding his application for refugee travel documents.[3/] App. 62a. Alistair Graham was

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[3/] Some of the statements petitioner made in this interview (specifically, denying further military service) provided the basis for Count V of the indictment, on which he was acquitted.

summoned from the Hague to come to Boston for the interview and a Serbo-Croatian interpreter was brought in from Washington, D.C. Id. AUSA West, Agent Carroll, Agent Hughes and Alistair Graham spoke on the telephone and then met, at least once, to plan how they would conduct the interview. Id. "The JTTF planned to obtain an arrest warrant before the interview, but did not disclose to Boskic . . . that he was under criminal investigation."[4] App. 5a.

The district court found that "the government agents believed that if Boskic knew he was under investigation, he would probably not talk. Consequently, they devised [a] plan to elicit the information they desired from Boskic about his military history, while shielding the fact that he was under investigation and that an arrest warrant had already been acquired." App. 62a-63a. Thus, although there was a working video camera set up in the interview room, the agents decided not to record the interview because petitioner might have suspected something.[5] App. 63a. Similarly,

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Other statements (those confirming his military service) served as the only means for the government to prove its case against petitioner on Counts I and II.

[4] Accordingly, on August 25, 2004, Special Agent Greg Nevano applied for and obtained a criminal complaint and an arrest warrant for two counts of immigration fraud against petitioner. Agent Nevano filed a detailed affidavit setting forth much of the evidence the agents had already collected. See App. 6a.

[5] The agents theorized that petitioner might know that ICE

although a Serbo-Croatian interpreter was available to interpret for petitioner during the entire interview, the agents decided against using the interpreter during the first part of the interview when Agents Carroll and Hughes were asking questions.[6/] Id. The plan was that nothing Carroll or Hughes said to petitioner up to the time Alistair Graham started talking would be translated. The government was worried that since interpreters are generally not available for travel document interviews, the presence of an interpreter might have caused petitioner to wonder if there was some kind of investigation. App. 64a n.2. Thus, the government agents decided to sacrifice the accuracy and the understanding that a video recorder and an interpreter would bring to the interview because they so desperately wanted to hide their investigation from petitioner. Ibid.

The government's plan was to start the interview with only ICE Agent Carroll in the room. App. 5a, 63a. Although the government had no intention of issuing travel documents, Carroll would begin by asking petitioner about why he wanted travel documents "to get Boskic talking." App. 63a. That "would lead to the questions of what [petitioner] did in Europe before he came to the United States,"

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agents generally recorded interviews only when they were going to deny benefits, and they did not want petitioner to think he was on the "verge of being denied" because it might cause him to suspect that he had been or was being investigated. App. 64a n.2.

[6/] Petitioner has limited English skills.

which would lead to questions about whether he had been in the military – which the agents knew would elicit a denial – and questions about whether he had a criminal record. Id. The questions about the criminal record would then lead to Agent Hughes entering the room on the pretext that, when a criminal record comes up, the applicant must be interviewed by the FBI, "even though," as the district court found, "that would not always be the case." Id.; see also App. 5a. Then, finally, Graham and an interpreter would be brought in to get to the real substance. App. 5a. The district court concluded that this was all a "deliberate ruse." App. 95a.

The Execution of the Government's Plan - The Interview

Petitioner arrived at the JFK Building for his travel document interview at approximately 3:00 p.m. on August 25, 2004, with his notice to come to the interview in hand. App. 6a, 64a. At approximately 3:35 p.m., Agent Carroll escorted petitioner from the reception area to the interview room.[7] App. 6a, 65a. Once the two were inside the interview room, Carroll administered an oath to petitioner and then asked him to sit, whereupon Carroll read petitioner his rights, in English, from a two-sided Miranda rights form. Id. Carroll then asked petitioner to sign the English side of the form, which petitioner did. App. 6a-7a, 65a. Carroll noted

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[7] Agent Carroll introduced himself to petitioner simply as "Tom Carroll." App. 6a, 65a.

the time, date and location on the English side of the form and asked petitioner to read, sign and date the Serbo-Croation side, which petitioner did. Agent Carroll inquired whether petitioner agreed with what he had read, and petitioner answered that he agreed and understood. App. 7a, 65a-66a.

Agent Carroll explained to petitioner that the purpose of the interview was to "go over" his application for a re-entry permit. App. 66a. The district court found that "Boskic believed him and, as the government concedes, it was reasonable for him to do so." Id. Petitioner proceeded to answer all of Carroll's questions, which were mostly "biographical" in nature.[8/] App. 8a, 67a. The district court credited petitioner's testimony that he answered the questions because "Mr. Carroll ... works in the immigration status and he's in charge of me and I thought that I had to answer his questions." App. 66a-67a.

One of the "biographical" questions Carroll asked was whether petitioner had any additional

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[8/] Carroll examined petitioner's passport and told him he did not need the travel document he was seeking because his passport was valid and had an I-551 stamp indicating that he was a permanent U.S. resident. App. 7a-8a, 67a. Petitioner insisted that he needed the document, however, based on advice he had received from a friend that Bosnia and Herzegovina had issued a new series of passports, making petitioner's passport invalid. App. 8a, 67a. Petitioner therefore stayed in the interview room, still believing the purpose of the interview was for him to obtain the document he clearly thought he had to obtain. Id.

military history other than the two years of service in the Yugoslav National Army in 1983 and 1984 that he had disclosed. App. 8a, 67a. Petitioner answered in the negative. Id. Carroll then moved on to questions about the petitioner's criminal record so that he would have a reason to bring Agent Hughes into the room. Id. When petitioner denied having such a record, Carroll, according to the government's well-orchestrated plan, stated that they[9/] had information to the contrary, and produced a copy of petitioner's Bosnian criminal record. App. 67a. Carroll then explained to petitioner that whenever an applicant for travel documents has a criminal record, the applicant must speak to an FBI agent.[10/] App. 67a-68a. Agent Carroll left the room and returned approximately one minute later with Agent Hughes.[11/] Id.

This time, Hughes took the seat behind the desk and Carroll sat next to petitioner. App. 68a. Hughes' first question to petitioner was, "[w]here are you from?" When petitioner replied "Bosnia," Hughes asked, "were you in the war?" Id. After Hughes got his anticipated and desired response (i.e., "no"), he moved on to ask questions about petitioner's

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[9/] Carroll used the word "we." App. 67a.

[10/] The district court noted that this was a deliberate misrepresentation. App. 98a.

[11/] When Hughes entered the room, Carroll gave petitioner a "condensed" version of his Miranda rights in English and reminded him that they were still in effect. App. 8a.

criminal record in Bosnia. Id.; see also App. 9a. The questioning lasted about fifteen minutes. App. 9a, 69a. According to plan, Agent Hughes then announced that there was yet another person who wanted to speak to petitioner. Id. Hughes left the room and returned with Alistair Graham and a Serbo-Croatian interpreter. Id.

When Graham entered the room, he took the seat behind the desk and introduced himself as an investigator with the ICTY.[12/] Id. He then gave petitioner the option of continuing the interview using the interpreter, which petitioner readily accepted. Id. Graham told petitioner that he wanted petitioner to listen to him before petitioner said anything. For about ten minutes, Graham explained his investigative work concerning the events in Srebrenica. He explained that he knew about the 10th Sabotage Detachment and he knew petitioner had been a member of that unit. He explained that he had video footage of petitioner in the unit. Id. The district court noted that petitioner "became 'unnerved' and 'unsettled' after Graham began his interview." App. 101a.

Graham proceeded to explain that petitioner "was not the subject of his investigation." App. 9a, 69a. Graham also explained that he was there on

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[12/] He did not tell petitioner that his "primary" object was to assist the United States government with its criminal prosecution of petitioner, even though that was, in fact, Graham's principle reason for being there.

behalf of the Tribunal to seek petitioner's cooperation in the investigation of "senior officials." App. 70a. Significantly, the district court found that "Boskic did not understand that Graham's investigation was different from the investigation of the American officials in the room. Neither Agent Hughes nor Agent Carroll said anything to alert Boskic to the fact that Graham's assurances did not pertain to any investigation they were conducting." App. 69a n.6. "Instead," the court found, both agents "purposefully allowed Boskic to think he was not the subject of investigation." App. 99a. "In doing so," said the court, "the actions of Agents Carroll and Hughes suggested that the three officials were all working together in furtherance of Graham's goal of prosecuting Boskic's senior officers for their roles in the Srebenica massacres and that Graham's assurance applied equally to the American authorities." Id.

After reassuring petitioner that he was not under investigation, Graham asked petitioner if he preferred to see the video before talking with him, to which he responded that he wanted to see it first. App. 9a, 70a. Graham showed petitioner a CD of an awards ceremony depicting the 10th Sabotage Detachment; after watching a portion of it, petitioner identified himself in the video.[13] App. 70a. Graham then repeated that petitioner was not the subject of

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[13] According to the government's carefully laid plan, the CD was already set to be played in the computer on the desk in the interview room. App. 70a.

the investigation; he only wanted petitioner's cooperation. Id. As the district court noted, "Boskic agreed to cooperate and even go to the Hague [to testify against the senior officials] if he had to." Id.

After Graham questioned petitioner for an hour, the three interrogators switched seats; Hughes took the seat behind the desk and asked many of the questions. Id. Hughes, Carroll and Graham also took turns asking questions. App. 10a, 71a. All three used the interpreter to translate their questions into Serbo-Croatian, and the interpreter translated petitioner's answers that were anything other than "yes" or "no." App. 71a.

When the interview was over, Hughes asked petitioner for a written statement. App. 10a, 71a. Petitioner was "nervous" and "hesitant." App. 101a. Accordingly, for the next ten to fifteen minutes, Hughes and Carroll explained "the benefits of him putting his story in his own words rather than relying on their version of his story," at which point petitioner agreed to make a written statement. App. 71a-72a; see also App. 10a. The district court found that "[n]one of the agents warned Boskic at this point that his statement might be used against him." App. 72a. Only the so-called "benefits" were disclosed. When petitioner finally agreed to write the statement, Agent Hughes dictated the first two sentences, which the interpreter then translated to defendant in Serbo-Croatian. App. 10a, 72a. Petitioner wrote down the translation as dictated, and proceeded to write the statement with help from

Agents Hughes and Carroll. App. 72a. Alistair Graham assisted with names and places. Id. This "interactive writing process" continued until approximately 8:20 p.m., when petitioner stopped writing and asked Agent Carroll what was going to happen to him. Id.

Agent Carroll responded that petitioner would be "held overnight" and taken before a judge in the morning. App. 72a-73a. Petitioner then inquired whether he was going to be arrested; Carroll confirmed that he was, and said it was for "violating immigration laws." App. 73a; see also App. 11a. As the district court noted, "[a]t this point, Boskic understood that he was being arrested 'because of the war in Bosnia,' but he may not have completely understood the charges against him." App. 73a. Petitioner then continued to write his statement because, as he testified, he had already "said everything." Id.

The Judgment Below

In petitioner's appellate brief, he argued that his oral and written statements to government agents regarding his service in the 10th Sabotage Division should have been suppressed because they were obtained in violation of his due process rights and his right to counsel.[14/] Petitioner argued that, by consciously misleading him with false assurances that he was not under investigation, the government coerced him into giving statements on August 25,

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[14/] The latter argument will not be taken up in this petition.

2004, thus violating his due process rights. Petitioner further argued that, even if that conduct alone was not enough to constitute coercion, the inherent pressure petitioner – an immigrant – felt to comply with questioning by immigration authorities who were "in charge" of him, when coupled with consciously misleading conduct by those authorities as to his status as a criminal defendant, constituted coercive official conduct which rendered his statements involuntary. Thus, argued petitioner, the failure to suppress these statements was not harmless error, as the government had presented no evidence at trial, other than petitioner's own oral and written statements, of his military service in the 10th Sabotage Division. The government therefore could not have shown, without petitioner's August 25, 2004 statements, that any alleged statements to the contrary on his immigration forms were false.

On October 22, 2008, the Court of Appeals for the First Circuit affirmed petitioner's conviction. See App. 56a. On the question of suppression, it held that, under the totality of the circumstances, the government's admittedly deceptive conduct did not render petitioner's resulting statements involuntary. See App. 24a-25a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FIRST CIRCUIT RAISES AN IMPORTANT ISSUE REGARDING THE CONSTITUTIONAL LIMITS ON NON-CUSTODIAL INTERROGATION METHODS, AS TO WHICH THERE IS A SPLIT IN THE CIRCUITS.

"It is . . . axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . . ."[15/] Jackson v. Denno, 378 U.S. 368, 376 (1964) (citations omitted). As this Court has observed, "due process derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices *voluntarily*[.]" Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Stevens, J., concurring in part in the judgment and dissenting in part) (emphasis added). This Court has defined "voluntariness" to encompass an act that is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." E.g., Moran v. Burbine, 475 U.S. 412, 421 (1986). Thus, a confession cannot be voluntary if it is not a product of "the unfettered exercise of [a person's] own will." Malloy v. Hogan, 378 U.S. 1, 8

15/ This Court has "used the terms 'coerced confession' and 'involuntary confession' interchangeably 'by way of convenient shorthand.'" Arizona v. Fulminante, 499 U.S. 279, 288 n.3 (1991), quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

(1964); accord Reck v. Pate, 367 U.S. 433, 440 (1961) ("The question . . . is whether a defendant's will was overborne at the time he confessed.")

In Colorado v. Connelly, supra, this Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause . . ."[16/] 479 U.S. at 167. Connelly simply clarified that voluntariness "depend[s] on the absence of police overreaching," rather than on any "moral and psychological pressures to confess emanating from sources *other than* official coercion." Id. at 170, quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985) (emphasis added). The Court did not define the parameters of official coercion, however, and the result has been confusion and conflict amongst the circuit courts as to what constitutes coercion sufficient to render a confession involuntary.

A. The Circuit Split

In the present case, petitioner's statements were elicited through deliberately deceptive government conduct, the implication of which was that petitioner could speak freely without fear of repercussion. Under this Court's jurisprudence –

[16/] Connelly concerned a defendant who approached an officer and spontaneously confessed to a crime he had committed some years ago. 479 U.S. at 160. It was later determined that the defendant suffered from a mental illness. Id. at 161. He thus argued that his confession could not have been voluntary, since he was ill at the time he made it. Id. at 161-162.

including Connelly, supra – this ought to constitute "coercive police activity." The district court explicitly found that the government agents "purposefully allowed Boskic to think he was not the subject of investigation." App. 99a. "In doing so," said the court, "the actions of Agents Carroll and Hughes suggested that the three officials were all working together in furtherance of Graham's goal of prosecuting Boskic's senior officers for their roles in the Srebenica massacres and that Graham's assurance applied equally to the American authorities." Id. Thus, according to the court, the government's conduct constituted a "carefully contrived and executed plan," App. 57a, "intended to create a false assurance that Boskic was not the subject of any domestic investigation." App. 100a (emphasis added).

Nevertheless, both the district court and the First Circuit determined that this was not "coercion" within the meaning of the case law. They reached that conclusion by relying primarily upon United States v. Byram, 145 F.3d 405 (1st Cir. 1998). According to the Byram court, "[g]iven the narrowed definition of coercion in Connelly, it would be very hard to treat as coercion a false assurance to a suspect that he was not in danger of prosecution." Id. at 408 (emphasis in original); see also 20a. In so holding, the First Circuit rejected petitioner's argument that his case was distinguishable from Byram because it involved *consciously misleading conduct* on the part of the government, which was

not present in Byram.[17] App. 22a. Instead, the court said, "under Connelly[,] Byram's interview statement . . . would not be 'involuntary' even if he were deceived.'" App. 22a, quoting Byram, 145 F.3d at 408. Thus, the court concluded, "[a]lthough the fact that the agents allowed [petitioner] to believe that he was not under investigation may have made him less guarded and self-protective, that deception alone did not make his statements involuntary."[18] App. 24a-25a.

The First Circuit's position therefore appears to be that deception of *any* kind is never "coercive police activity" rendering a confession involuntary.

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[17] In Byram, the defendant agreed to cooperate in a murder investigation and testify at the trial of his friend after the government assured him that he was not "implicated in any of this" (*i.e.*, that he was not implicated in the murder investigation). Byram, 145 F.3d at 406. Byram was later charged with being a felon in possession of a weapon, something to which he had admitted during the course of his interview with police about the murder. Id. at 406-07. There was no consciously misleading conduct on the part of the government in Byram, however. Indeed, it was not clear whether the interrogating detective even knew about the "possible possession charge" against Byram. Id. at 406. Here, by contrast, the district court found that the government agents "intended to create a false assurance that Boskic was not the subject of any domestic investigation," App. 100a (emphasis added), when in fact, he was. Each of the agents was aware of the plan, and of the charges that had already been filed in the criminal complaint taken out against Boskic.

[18] Of course, the government did more than "allow" petitioner to believe he was not under investigation; he was specifically told that was the case.

Yet the Third Circuit, dealing with a set of facts analogous to those in petitioner's case, interpreted Connelly much differently.

In United States v. Swint, 15 F.3d 286, 290-91 (3d Cir. 1994), the defendant, who was out on bail on state drug charges, was summoned to the district attorney's office by the deputy district attorney under the guise of a discussion regarding cooperation and a possible plea agreement. Swint was led to believe that this would be an off-the-record proffer, which he would make in exchange for a plea. Unbeknownst to the defendant, a special agent from the Drug Enforcement Administration ("DEA") had asked the district attorney to arrange the meeting so that he could confront Swint about possible federal drug charges stemming from Swint's post-arrest conduct, to wit, procuring chemicals for methamphetamine manufactuing. 15 F.3d at 287. Swint thus arrived at the district attorney's office and, after a brief discussion regarding defendant's post-arrest conduct – which he denied – the district attorney brought federal agents into the room to question Swint. The agents informed Swint that they had a warrant for his arrest, and threatened to take him into custody and revoke his bail unless he cooperated. Swint, believing this would still be a part of his off-the-record proffer, agreed to cooperate, and proceeded to make incriminating statements, which he then sought to suppress at trial. Id. at 288.

The Third Circuit held that, under Connelly, these statements were the product of government

coercion, thus rendering them involuntary. Id. It agreed with the district court that several factors contributed to making the statement involuntary: Swint's understanding that the meeting was an informal, off-the-record proffer; the fact that such proffers were commonplace in that jurisdiction; the fact that he had not been informed that federal agents would be present at the meeting, nor that federal charges would be discussed; the "temporal proximity" between the discussion of the state and federal charges; and the fact that no one informed him that his statements to the DEA agents were not actually off-the-record. Id. at 290. The Third Circuit concluded that:

> whatever might be true in other cases, in the circumstances here, there was much more involved than confusion. In this case, the government's misleading conduct was coercive, and this coercive conduct caused Swint's confusion, depriving him of the ability to make a free and unconstrained choice about whether to make a statement to federal agents.

Id.

Likewise, in United States v. Walton, 10 F.3d 1024 (3d Cir. 1993), the Third Circuit held that the defendant's prior relationship with a government agent, the agent's comment that his conversation with defendant would be "off the cuff," and the fact

that defendant had no reason to believe he was the subject of a criminal investigation, taken together, rendered defendant's statements involuntary. Id. at 1030. Notably, the fact that defendant had no reason to believe he was the subject of a criminal investigation was "most important" to the finding of an implied promise not to use his statements against him. Id. (emphasis added). Accord United States v. Jacobs, 431 F.3d 99, 110, 113 (3d Cir. 2005) (fact that defendant had long-standing relationship with police, and was not aware she was a target – and had actually provided helpful information – in the instant criminal investigation, led court to conclude that government made implied promise that defendant's statements would not be used against her; defendant believed her conversation "to have been between informant and law enforcement contact, not suspect and policeman").

It is thus clear that, under the Third Circuit's definition of "coercive police activity," petitioner's statements – elicited by the government through assurances that he was not the subject of their investigation – would have been involuntary, and therefore inadmissible.

Consequently, this is a case in which certiorari is necessary in order to resolve the split in the circuits as to the types of non-custodial interrogation techniques that rise to the level of "coercion" rendering a confession involuntary.

B. The Third Circuit's Interpretation of Connelly is Correct.

The Third Circuit has properly interpreted Connelly to mean that intentionally deceiving a suspect into believing that he may speak without consequence renders any resulting statements involuntary. This reading is consistent with this Court's definition of "voluntariness" in the context Miranda waivers: if a person has been *deceived* by the government into acting, his act is simply not the product of free will. E.g., Moran, 475 U.S. at 421. These cases are properly read as part of the same overarching doctrine; as the Connelly Court affirmed, the concept of "voluntariness" is essentially the same in the Miranda and confession contexts. Both are based on the Fifth Amendment, "[t]he sole concern" of which is governmental coercion." 479 U.S. at 169-70. The Court went on to say that "[t]he voluntariness of a waiver of this provision has always depended on the absence of police overreaching," and cited Moran for the proposition that "intimidation, coercion [and] deception" constitute such overreaching conduct. Id. at 170.

Moreover, if the First Circuit's approach to coercion were correct – *i.e.*, that deceiving a suspect into thinking he could speak freely is *not* coercive – it would fly in the face of a long line of precedent in this Court holding that, when the government communicates to a person, either directly or indirectly, that he will not face negative consequences for his actions, for the government to

then turn around and punish a person for those very same actions violates his due process rights.

For example, in Doyle v. Ohio, 426 U.S. 610, (1976), this Court held that, once a person has been informed by the government that he has the right to remain silent (thus creating an implicit assurance that silence will carry no penalty), "it would be fundamentally unfair and a deprivation of due process to allow the . . . person's silence to be used to impeach [him]." Id. at 618. Similarly, in Raley v. Ohio, 360 U.S. 423 (1959), this Court held that it would be an "indefensible sort of entrapment" to allow the government to advise a person that he could assert his right to remain silent, and then prosecute him for his subsequent refusal to speak. Id. at 438. This is particularly true where "there were more than commands simply vague or even contradictory. There was active misleading." Id.; accord Cox v. State of Louisiana, 379 U.S. 559, 571 (1965) (where police affirmatively told defendant that he could hold an assembly in a specific location, defendant could not then be prosecuted for demonstrating where the police had told him to demonstrate).

This concept is equally applicable to petitioner's case. Where the government repeatedly told petitioner that he was not the subject of their investigation, and intentionally led him to believe that no harm would come to him by speaking, it would violate the principles of due process to allow the government to turn around and use his

statements against him.

CONCLUSION

For the reasons set forth above, this case presents important issues with regard to the constitutional limits of non-custodial interrogation, about which there is a split in the circuits. This Court should therefore grant certiorari to review the decision of the court below.

Respectfully submitted,

Max D. Stern
(Counsel of Record)
Alexandra Deal
Stern, Shapiro, Weissberg
& Garin, LLP
90 Canal Street, 5th Floor
Boston, MA 02114
(617)742-5800

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 07-1188
UNITED STATES,
Appellee,

v.

MARKO BOSKIC,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before

Lynch, Chief Judge,
Tashima* and Lipez, Circuit Judges.

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* Of the Ninth Circuit, sitting by designation.

Max Stern, with whom Patricia Garin, Jeffrey P. Wiesner, Alexandra H. Deal, and Stern, Shapiro, Weissberg & Garin were on brief, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief, for appellee.

October 22, 2008

LIPEZ, Circuit Judge. This case requires us to address a number of important issues: the relationship between deceptive interrogation tactics used by law enforcement and the voluntariness of statements under the Fifth Amendment; the attachment of the right to counsel under the Sixth Amendment; and the applicability of the fundamental ambiguity and literal truth defenses in a false statement prosecution. Appellant Marko Boskic, a citizen of Bosnia, was found guilty on two counts of making false statements in his applications for refugee status and permanent residency in the United States. See 18 U.S.C. § 1546. The government claimed that Boskic deceived immigration officials by concealing his service in the Army of the Republic Srpska, which has been held responsible for the massacre of 8,000 Muslim men and boys during the Bosnian War.

On appeal, Boskic cites two errors: (1) the district court should have granted his motion to suppress statements made during an interview with

government agents because those statements were secured in violation of his Fifth and Sixth Amendment rights; (2) the court should have granted his motion for judgment of acquittal because the evidence was insufficient to support a finding of falsity in his two statements. We find no error and affirm.

I.

We draw our account of the events at issue primarily from the evidence provided at Boskic's suppression hearing and trial. The facts underlying this appeal are largely undisputed. To the extent that the facts pertinent to the motion to suppress are contested, we rely on the district court's factual findings unless they are clearly erroneous. United States v. Perez-Montanez, 202 F. 3d 434, 438 (1st Cir. 2000). In the context of the motions for judgment of acquittal, we take the relevant facts in the light most favorable to the jury's verdict. United States v. Bucci, 525 F.3d 116, 121 (1st Cir. 2008).

A. Background

On February 17, 2000, Boskic, while in Germany, filed an Application for Registration for Classification as a Refugee, known as Form I-590, which included questions regarding his past military service, his criminal history, and his reasons for seeking refugee status. Based on the information he provided on the Form 1-590, Boskic was approved for refugee status. He immigrated to the United States

later that year, settling in Peabody, Massachusetts. In April 2001, he filed an Application to Register as a Permanent Resident or Adjust Status, known as a Form I-485, which also included questions about his past military service and his criminal history. Boskic was granted permanent residency on June 29, 2002.

Alistar Graham, an investigator for the International Criminal Tribunal for the former Yugoslavia ("ICTY") between 2001 and 2005, collected information identifying Boskic as a member of the 10th Sabotage Detachment of the Army of the Republika Srpska in the course of his investigation of alleged war crimes in and around Srebrenica, Bosnia and Herzegovina. Acting on Graham's information, the Joint Terrorism Task Force ("JTTF") in Boston, which included representatives of Immigration and Customs Enforcement ("ICE"), the Federal Bureau of Investigation ("FBI"), and the United States Attorney's Office, initiated an investigation in the fall of 2002 to determine whether Boskic had committed immigration fraud by failing to disclose on his I-590 and I-485 forms that he had been a member of the 10th Sabotage Detachment of the Army of the Republika Srpska. The JTTF also had information indicating that Boskic had a criminal record prior to entering the United States, which Boskic had not listed on his immigration forms.

The primary agents on this investigation were FBI Agent Greg Hughes, ICE Agent Thomas Carroll, and Assistant U.S. Attorney Kimberly West.

Graham assisted these JTTF agents but was not a primary agent. He provided evidence identifying Boskic as a member of the 10th Sabotage Detachment, including video footage of Boskic's participation in that unit. Graham was motivated to help the JTTF agents in their investigation of Boskic because, in part, he hoped that he could obtain Boskic's assistance in the ICTY's investigation of senior military officials involved in the Srebrenica massacres.[1]

In the Spring of 2004, the JTTF agents learned that Boskic had submitted an application for travel documents. Acting upon this information, they devised an immigration interview concerning the travel documents as a ruse for an interview regarding Boskic's past military service. The JTTF planned to obtain an arrest warrant before the interview, but not to disclose to Boskic at the outset of the interview that he was under criminal investigation. ICE Agent Carroll would start the interview. Once Boskic's criminal history had been raised, FBI Agent Hughes would join the conversation. Then, Graham would enter the interview room with an interpreter to solicit information from Boskic about the 10th Sabotage Detachment.

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[1] During the Bosnian War, the United Nations designated Srebrenica as a safe haven. However, in July 1995, Bosnian Serbs violently took control of Srebrenica and killed 8,000 Bosnian Muslim men and boys, an act which has since been characterized as genocide. See Marlise Simons, Court Declares Bosnia Killings Were Genocide, N.Y. Times, Feb. 27, 2007, et al.

In response to a notice to appear, Boskic arrived for his interview at the JFK Federal Building in Boston, Massachusetts on August 25. 2004 at 3:30 p.m. Consistent with the plan, JTTF had secured an arrest warrant charging Boskic with two counts of immigration fraud.

B. Interviews

Carroll met with Boskic in the reception area, introducing himself as "Tom Carroll" and escorting Boskic to the interview room. Once they entered the room, Carroll asked Boskic to remain standing so that he could administer an oath.[2] After Boskic completed the oath and sat down, he was provided with a form advising him that he had the right to remain silent and to receive the assistance of counsel. See Miranda v. Arizona, 384 U.S. 436 (1966). These Miranda warnings were written in English on one side of the form and in Serbo-Croatian on the other side.[3] Carroll read Boskic his

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[2] Carroll asked Boskic, "Do you swear all the statement you're about to give will be the whole truth, so help you God." Boskic responded in the affirmative. Carroll testified that this oath was administrated in all immigration interviews.

[3] The form, entitled "United States Department of Justice, Immigration and Naturalization Service, Warning as to Rights," said:

> Before we ask you any question, you must understand your rights.
>
> You have the right to remain silent.

Miranda warnings in English with Boskic reading along. Boskic signed the English side, on which Carroll had already written the date and time, and then read the Serbo-Croatian side of the form before signing it and noting the date and time.[4] Carroll asked Boskic whether he understood what he had read and Boskic said that he did.

At the outset of the interview, Carroll examined Boskic's passport and determined that Boskic did not need the travel documents for which he had applied because Boskic had the proper stamp in his Bosnian passport indicating that he was a

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> Anything you say can be used against you in court, or in any immigration or administrative proceeding.
>
> You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
>
> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

[4] The following language labeled "waiver" was located directly above the signature block: "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

permanent resident of the United States. Although Carroll informed Boskic that he did not need additional travel documents, Boskic insisted, based on information from a friend, that he could not travel on his Bosnian passport because Bosnia and Herzegovina had recently issued a new series of passports. According to the district court, Boskic continued with the interview because he believed that the purpose of the interview was to go over his application for a re-entry permit.

Boskic spent forty-five minutes providing basic biographical information, such as his date of birth, when he came to the United States, and his reasons for applying to travel. Then Carroll asked Boskic about his prior military experience. Boskic responded that he had fulfilled the two-year mandatory military service for the Yugoslav Army in 1983 and 1984. When explicitly asked whether he had any additional military experience, Boskic said "no." Similarly, Boskic denied having a criminal record in Bosnia. Carroll then told Boskic that he had information about Boskic's criminal record and needed to bring in the FBI to assist with the questioning.

At that point, Carroll left briefly and returned with Hughes. Carroll gave to Boskic what he described as a condensed version of the Miranda warnings, reminding Boskic that his Miranda rights were still in effect and that he was still under oath. In response to Hughes' questioning, Boskic said that he was from Bosnia but denied having been a soldier

in the Bosnian War. When Hughes confronted Boskic with his Bosnian criminal record, Boskic claimed that the charges had been fabricating by Muslim officials who were punishing him for declining to join their army. Hughes questioned Boskic for about fifteen minutes before telling him that there was another person who wanted to speak with him. Hughes then left the room, returning with Graham and a Serbo-Croatian interpreter.

When Graham and the interpreter entered, Carroll once again reminded Boskic that his Miranda rights were still in effect. Graham introduced himself as an investigator from the ICTY and asked whether Boskic wanted to continue the interview using the interpreter, which Boskic elected to do. Graham instructed Boskic to listen to what he had to say and then proceeded to talk for approximately ten minutes about his investigation of the events associated with the massacre at Srebrenica. Graham told Boskic that he knew Boskic had been part of the 10th Sabotage Detachment and that he had video footage of Boskic participating in that unit's award ceremony. Then Graham told Boskic that Boskic was not the subject of his investigation.

At that point, Graham asked Boskic if he wanted to talk to him or to watch the video. Boskic elected to do the latter. He confirmed his identity in the video and commented that he knew this day would come. After repeating that Boskic was not the subject of his investigation, Graham asked Boskic for his cooperation. Boskic agreed to help and, according

to Graham, said that "if he was to go down for what happened, others would go down as well." Then Boskic described his involvement in the Branjevo Military Farm massacre and talked about his role in the genocide at Srebrenica. When they took a break around 6:00 p.m., snacks were provided.

After the break, the three agents – Carroll, Hughes, and Graham – all questioned Boskic for another hour. Boskic agreed to let them search his home as well as his car so they could find information about other people who were involved in Srebrencia.[5] At the end of the questioning, Carroll and Hughes spent ten to fifteen minutes convincing the reluctant Boskic to put his story into a written statement. The agents claimed that it would be advantageous for him to have the statement in his own words rather than relying on their version of his story.

At approximately 7:00 p.m., still working with the assistance of a Serbo-Croatian interpreter, Hughes dictated two sentences to Boskic, which Boskic wrote down in Serbo-Croatian to begin his statement: "I, Marko Boskic, understand and give up my rights. I am giving this statement voluntarily, without promises and guarantees." Hughes asked Boskic whether he understood that writing the

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[5] We need not discuss the evidence found at Boskic's home and in his car because Boskic does not challenge the admission of this evidence on appeal and it does not figure prominently in Boskic's convictions.

statement was voluntary, to which Boskic responded in English: "If I'm writing this down, I know what I'm doing." Boskic then admitted in the statement that he served in the 10th Sabotage Detachment of the Army of the Republika Srpska and participated in the Srebrenica massacre, though he claimed his involvement was involuntary. Around 8:20 p.m., while he was still composing his statement, Boskic asked "What's going to happen tonight?" Carroll responded that they were going to hold him overnight and then bring him before a judge in the morning. Boskic asked whether he was going to be arrested. Carroll said that he would be arrested for immigration fraud.

When Boskic had completed his statement, at approximately 10:15 p.m., Hughes suggested that Boskic also write that he had lied on his immigration forms. Boskic refused to do so, saying to Hughes, "Greg, if you had a women that you loved and wanted to be with her, wouldn't you lie to keep her?" Boskic also said that he "knew what this was about when the FBI came in." Boskic was then arrested and transported to the Suffolk County House of Corrections.

C. Procedural History

On September 24, 2004, a grand jury indicted Boskic on four counts of making false declarations on immigration documents in violation of 18 U.S.C. § 1546(a),[6] and one count of violating 18 U.S.C. § 1001

[6] The four counts were as follows: (1) making a false

by making false material statements to government agents in his original immigration interview.[7] Prior to his trial, Boskic filed a motion to suppress, inter alia, the statements he made in the staged immigration interview. Boskic argued that his rights under the Fifth and Sixth Amendments had been violated in the interview. The district court denied the suppression motion.

Boskic's eight-day jury trial began on June 26, 2006. In addition to the background information described above, the evidence included Agent Hughes' testimony that Boskic had told him that he has been advised while in Germany not to disclose

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statement under oath with respect to material facts on a Registration for Classification as a Refugee, Form I-590, by stating that he served only in the Yugoslav National Army and no other, (2) making a false statement under oath with respect to material facts on an Application to Register as a Permanent Resident or Adjust Status, Form I-485, by stating that he served only in the Yugoslav National Army and no other, (3) making a false statement under oath with respect to material facts on a Registration for Classification as a Refugee, Form I-590, by stating that he had never ordered, assisted or otherwise participated in the persecution of other persons because of race, religion and political opinion, and (4) making a false statement under oath with respect to material facts on an Application to Register as a Permanent Resident or Adjust Status, Form I-485, by stating that he had never ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion.

[7] On this count, the pertinent false statement was that he had only served in the Yugoslav National Army, when in fact he had also served in the Army of the Republika Srpska.

his past military service if he wanted to move to the United States.[8] The government also called as a witness Dr. Arti Gehani, a volunteer with the International Rescue Committee ("IRC"), who helped Boskic complete his Form I-485 in April 2001. Although she did not specifically recall assisting Boskic, she testified that she typically read the questions on the form to the individuals with whom she worked, paraphrasing the English as she went along. She customarily translated the form's question about military service by asking if the applicant "had ever been in the military." The government also provided evidence that Boskic had characterized his English language skills as "good" on a form that was filed contemporaneously with the Form I-485, and that this self-assessment was accurate.[9]

The jury convicted Boskic on the first two counts alleging violations of 18 U.S.C. § 1546(a) and acquitted him on the remaining counts. Boskic then filed a motion for judgment of acquittal on the two counts of conviction, which the court denied at sentencing in November 2006. The court sentenced Boskic to 63 months of imprisonment to be followed

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[8] On cross-examination, Hughes acknowledged that his written report following the interview did not state that Boskic had told him about this advice.

[9] Boskic's self-assessment was corroborated by evidence that as of April 2001 he had been working at K-Mart for ten months and was in regular contact with the IRC in English regarding the status of his immigration documents.

by three years of supervised release.

Boskic now appeals the convictions on the grounds that the district court erred in denying his motion to suppress and that the evidence failed to support the verdict. We analyze Boskic's claims relating to the motion to suppress first because our decision on this motion affects the record that we must consider in evaluating Boskic's motion for judgment of acquittal. We precede that analysis with a summary of the district court's suppression decision.

II.

Claiming that the agents used deceptive interview tactics that were tantamount to coercion in violation of his Fifth Amendment due process rights, Boskic moved to suppress all of the statements that he made during the August 25, 2004 interview. Boskic also sought suppression for a violation of his Sixth Amendment right to counsel, claiming that the officers improperly conducted their interview in the absence of his attorney. The district court conducted a suppression hearing, at which Boskic and the three agents involved in the interview testified.

In its Memorandum and Order on the motion to suppress, the district court divided its analysis of Boskic's interview into three distinct periods: (1) Carroll's and Hughes' interview of Boskic, (2) Graham's interview of Boskic and the joint interview conducted by Carroll, Hughes, and Graham prior to

8:20 p.m., and (3) the joint interview by all three agents subsequent to 8:20 p.m. when Boskic became aware of the impending arrest. During the first period, Boskic provided basic biographical information and misrepresented his past military service as well as his criminal history to Carroll and Hughes. During the second period, Boskic described his involvement in the Branjevo Military Farm massacre and the events at Srebrenica, gave permission for the agents to search his home and car, and started memorializing his disclosures in writing. At 8:20 p.m., the beginning of the third period, Boskic asked whether he was going to be arrested. The agents responded in the affirmative. Nonetheless, Boskic completed his written statement and said to Hughes, "Greg, if you had a woman that you loved and wanted to be with her, wouldn't you lie to keep her?"

Before the district court, Boskic sought to suppress statements made during all three of these periods.[10] He argued that the agents misled him as to the true nature of their investigation because they initiated the interview under the pretense that it was an immigration interview and because Graham said that Boskic was not the subject of his investigation. According to Boskic, this deception constituted a coercive official tactic that rendered his statements involuntary in violation of the Fifth Amendment.

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[10] On appeal, Boskic does not contest the district court's denial of his motion to suppress statements made before Graham started interviewing him.

The district court agreed with Boskic's assessment that when Graham told Boskic he was not the subject of his investigation, the agents' "actions and silence were intended to create a false assurance that Boskic was not the subject of any domestic investigation."

Nonetheless, the district court explained that mere trickery by the police during an interrogation does not necessarily rise to the level of coercion. It then looked to the totality of the circumstances to assess whether the government had met its burden of proving the voluntariness of Boskic's statements. To that end, it considered the following statutory factors:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of

> counsel when questioned and when giving such confession.

18 U.S.C. § 3501(b).[11] The court also noted that "[t]he Supreme Court has listed other potential circumstances that are relevant to the voluntariness of the confession." See Withrow v. Williams, 507 U.S. 680, 693-94 (1993) (explaining that the court should consider the defendant's maturity, education, physical condition and mental health, in addition to the length of the interrogation and its location when considering the totality of the circumstances). The court found that on balance these factors weighed in favor of voluntariness. Therefore, the court rejected the Fifth Amendment due process claim.

On the Sixth Amendment claim, the court held that even though the agents had filed a criminal complaint against Boskic and obtained an arrest warrant before the interview, Boskic's right to counsel had not yet attached at the time of the staged immigration interview. The court also noted that Boskic never invoked his right to counsel even though he was provided with the Miranda warnings.

III.

When considering challenges to a district court's denial of a motion to suppress, we review conclusions of law de novo and findings of fact for

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[11] This provision is a subsection of 18 U.S.C. § 3501, which addresses the admissibility of confessions.

clear error. United States v. Jones, 523 F.3d 31, 36 (1st Cir. 2008). As such, we review de novo whether a statement is voluntary and review for clear error the subsidiary findings of fact. United States v. Rojas-Tapia, 446 F. 3d 1, 3 (1st Cir. 2006). If any reasonable view of the evidence supports the denial of a motion to suppress, we will affirm the denial. United States v. Holloway, 499 F.3d 114, 117 (1st Cir. 2007).

A. Coercion

1. The Standard for Determining Coercion

On appeal, Boskic focuses on two factors in making his involuntariness argument: the agents' deceptive interrogation tactics and the coercive nature of the immigration interview. We have noted that Boskic received the Miranda warnings at least three times during the course of his interview with Hughes, Carroll, and Graham. However, this case does not involve any claims by Boskic that the government failed to comply with the Miranda procedure, which applies only to custodial settings. Boskic acknowledges that he was not in custody prior to 8:20 p.m., when he was told that he would be arrested.

Instead, Boskic argues that his statements during this non-custodial period, between Graham's assurance that Boskic was not the subject of Graham's investigation and 8:20 p.m., were involuntary because he was tricked into believing

that he was not under investigation. Boskic also contends that his statements during the post-8:20 p.m. period, once he was informed that he was going to be arrested and the interview became custodial, were also involuntary because the taint from the involuntariness of the earlier coercion had not dissipated. Boskic further argues that even if the government's misrepresentation did not itself render his statements involuntary, the "quasi-coercive" nature of the immigration interview, in conjunction with Graham's misrepresentation, made his statements involuntary.

In evaluating whether a defendant's statements were voluntary, we must use the standard set forth in Colorado v. Connelly, 479 U.S. 157 (1986). There the Supreme Court stated that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fifth Amendment." Id. at 167. This standard reflected a shift in the Supreme Court's jurisprudence.

> Historically, the requirement that admissible confessions be 'voluntary' reflected a variety of values; these included deterring coercion, assuring reliability of confessions, and protecting the suspect's free choice whether to confess. Thus, at common law, confessions produced by promises not to prosecute or offers of leniency were often excluded as involuntary.

United States v. Byram, 145 F. 3d 405, 407 (1st Cir. 1998). However, after Connelly, only confessions procured by coercive official tactics should be excluded as involuntary." Id.

2. The Agents' Deception

Boskic argues that the agents' misrepresentations – through assurances and silence – constituted coercion sufficient to make his statements subsequent to Graham's arrival involuntary. He points to Graham's specific assertion that he was not under investigation, and the purposeful silence of Carroll and Hughes in the face of Graham's assurances. Indeed, Boskic emphasizes the district court's finding that he probably would not have spoken with the agents about his involvement in the Army of the Republika Srpska if he had known that he was the subject of Carroll's and Hughes' investigation.

We have previously held that "trickery is not automatically coercion" and, "[g]iven the narrowed definition of coercion in Connelly, it would be very hard to treat as coercion a false assurance to a suspect that he was not in danger of prosecution." Byram, 145 F.3d at 408. The district court emphasized this language from Byram in rejecting Boskic's coercion argument. An understanding of Byram is critical for an evaluation of the arguments of the parties.

The defendant in Byram, who was not advised of his Miranda rights at the outset of a courthouse interrogation, agreed to cooperate in a murder investigation and to testify at the subsequent trial of his friend because he was assured that he was not "implicated in any of this," referring to the murder under investigation. Id. at 406. When he was later charged and tried for being a felon in possession of a weapon, a crime that he had admitted to during the police interrogation and while testifying at the friend's murder trial, he filed a motion to suppress these incriminating statements. Id. at 406-407

Expressing concerns about the voluntariness of Byram's statements and the violation of his due process rights, the district court suppressed Byram's statements from both the courthouse interrogation and the trial. Id. at 407. The government appealed the suppression of the statements made at trial, but not those made during the courthouse interrogation, which the district court deemed custodial. Id. Although we affirmed in part the district court's suppression ruling on appeal, finding that the defendant's trial testimony was inadmissible against him because it was the "fruit" of a Miranda violation at the custodial interrogation, we rejected the defendant's alternative argument that his statements during the courthouse interview and on the witness stand were involuntary. Id. at 408-10. Recognizing that certain types of police trickery can constitute coercion, we held that a police statement that was "literally true so far as the murder charge was concerned but a suggestio falsi as [it] pertains to

a possible possession charge" was not such an instance. Id. at 409.

Boskic argues that the district court wrongly relied on Byram because Byram did not involve "consciously misleading conduct on the part of the government." Here, by contrast, there was a "carefully contrived and executed plan" to deceive Boskic into believing that he was not a target of any investigation. Byram does not support this distinction between contrived and unplanned trickery, given our statement there that "under Connelly[,] Byram's interview statement, like his trial testimony, would not be 'involuntary' even if he were deceived." Id. at 408. Nonetheless, Boskic argues that, on the question of coercion, we later drew the distinction in United States v. Flemmi, 225 F.3d 78, 91-92 (1st Cir. 2000), between the statements by police officials that were inadvertently misleading and statements that were consciously misleading. Hence Flemmi, like Byram, is critical to an evaluation of the arguments of the parties.

The defendant in Flemmi was "one of Boston's most notorious gangsters" as well as an FBI informant. Id. at 80. Prior to his trial, the defendant filed a successful motion to suppress, arguing that incriminating evidence collected in connection with the FBI's electronic surveillance should not be admissible against him because he was promised use immunity by the FBI agents with whom he was working. Id. at 80-81. On interlocutory appeal, we vacated the suppression order, holding that the

promises of use immunity by the suppression order, holding that the promises of use immunity by the FBI agents were unenforceable. We also rejected the defendant's argument that his statements were involuntary because the FBI agents' unauthorized promises of immunity induced his statements. Id. at 91.

In arguing that Flemmi modified Byram's holding on the relationship between police deception and coercion, Boskic points to our comment in a Flemmi footnote that there was "no evidence that [the FBI agents] intended to mislead Flemmi or tried to dupe him." Id. at 91 n.5. Boskic insists that the absence of deceit was the primary basis for our decision that the official conduct was non-coercive. This insistence is a misreading of Flemmi. The lack of evidence of consciously misleading conduct on the part of the agents was cited as one factor in the totality of the circumstances test applied to the voluntariness question. Moreover, we explained explicitly in Flemmi that the challenged statement would be viewed as voluntary "even if the government could be charged with deceit on this record." Id. Therefore, Flemmi does not modify the proposition set forth in Byram that "confessions procured by deceits have been held voluntary in a number of situations." Byram, 145 F. 3d at 408; Flemmi, 225 F.3d at 91 n.5.

Nevertheless, we acknowledged in Byram that "some types of police trickery can entail coercion," 145 F.3d at 408, citing the example of Lynumn v.

Illinois, 372 U.S. 528 (1963). There, a suspect was told that she was in jeopardy of losing her children and her welfare benefits if she did not cooperate. Id. at 534. The unfounded threat by the police in Lynumn

> "did more than affect the suspect's beliefs regarding her actual guilt or innocence, and judgments regarding the evidence connecting her to the crime. It also distorted the suspect's rational choice . . . by introducing a completely extrinsic consideration: an empty but plausible threat to take away something to which she and her children would otherwise be entitled. This extrinsic consideration not only impaired free choice, but also cast doubt upon reliability of the resulting confession . . . ."

United States v. Boskic, 2006 WL 1540488, at *16 (D. Mass. June 2, 2006) (emphasis omitted) (quoting Holland v. McGinnis, 963 F.2d 1044, 1051-52 (7th Cir. 1992) (internal citations omitted)). Here, there were no such extrinsic factors that distorted Boskic's judgment about the evidence implicating him in making false statements to immigration authorities or that case doubt on the reliability of his statements. Although the fact that the agents allowed him to believe that he was not under investigation may have made him less guarded and self-protective, that deception alone did not make his

statement involuntary.

3. Immigration Interview

Boskic asserts that "[e]ven assuming the deliberate misrepresentations made by the government are not enough, standing alone, to render [his] statements involuntary, when they are taken in conjunction with what the district court found to be the 'quasi-coercive nature of the official immigration interview,' there can be no doubt that, under the totality of the circumstance, [his] will was overborne." In support of this position, Boskic argues that he only spoke to the authorities because he believed his status as an immigrant required him to cooperate with Carroll, whom he believed to be an immigration official. At the suppression hearing, Boskic testified that Carroll "works in the immigration status and he's in charge of me and I thought I had to answer his questions."

We agree with the district court that "the quasi-coercive nature of an official immigration interview in a federal building, whether the door is open or not, [is] a factor to be considered in deciding whether a confession was given voluntarily" because it would be "naive to ignore the perception – indeed fear – of all non-citizens in the United States that immigration authorities control their fate." We also agree with the district court that the following factors weigh against voluntariness: (1) the agents' decision not to inform Boskic of the nature of the offenses that they suspected he had committed, (2)

the absence of counsel during the interview, and (3) Boskic's nervousness and hesitancy at the outset of the interview.

However, we also agree with the district court that there are many other factors that weigh in favor of voluntariness. The agents told Boskic on at least three occasions that he could remain silent and that he could have the assistance of counsel if he so requested, even though they were not required to provide Boskic with Miranda warnings before 8:20 p.m., when the custodial portion of the interrogation began. From the outset of Graham's questioning, Boskic understood that he was being interviewed in connection with his involvement in the 10th Sabotage Detachment, and he told Graham that "if he [Boskic] was to go down for what happened, others would go down as well." The interview was not particularly lengthy. Boskic had regular breaks from questioning during which food and drink were offered. The interview room had adequate lighting, Boskic was never subjected to physical discomfort, and a translator was used once Graham began his questioning. In addition, Boskic was well-educated, mature adult of forty years, who had a general familiarity with the American legal system and was in good mental and physical health. See generally Withrow, 507 U.S. at 693.

Additionally, when Boskic began to write his statement around 7:00 p.m., Carroll, through the interpreter, dictated the following phrase to Boskic: "I am giving this statement voluntarily, without

promises and guarantees." Using the interpreter, Carroll asked whether Boskic understood the meaning of this phrase. Boskic responded in English, "If I'm writing this down, I know what I'm doing." When Agent Hughes later suggested that Boskic write in his statement that he lied on the immigration forms, Boskic declined to do so. These choices and comments reflect Boskic's calculation, an understanding of his right not to cooperate or talk, and some measure of self-protection. Given all of these factors, we agree with the district court that the statements obtained from Boskic during the immigration interview were voluntary.[12]

IV.

Boskic argues that the district court erred in concluding that this Sixth Amendment right to counsel did not attach when the law enforcement agents filed a criminal complaint prior to their interview with him. He further asserts that he did not waive his Sixth Amendment rights and that the statements he made during the interview should therefore be suppressed. In order to assess this contention, we must review some Sixth Amendment principles.

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[12] Boskic argues that even though he received Miranda warnings, the statements obtained from him during the custodial interrogation after 8:20 p.m. were involuntary because his statements prior to that time had been involuntary. Having rejected the conclusion that the earlier statements were involuntary, we need not consider this argument any further.

A. Sixth Amendment Law

The Sixth Amendment provides that, "[i]n all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The Supreme Court has often explained that a criminal prosecution commences, and the right to counsel attaches, at or after "'the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Rothgery v. Gillespie County, 128 S. Ct. 2578, 2583 (2008) (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion))). The Court has emphasized that this

> rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

Id. (quoting Kirby, 406 U.S. at 689).

Rothgery, the Court's most recent pronouncement on the Sixth Amendment right to counsel, establishes that the right attaches at least when the defendant first appears before a judicial officer. Id. at 2586. The Court observed there that "by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." Id.

It is equally well settled that the Sixth Amendment right may attach before a defendant first faces a judicial officer. The Court repeatedly has included the return of an indictment or the filing of an information among the circumstances that constitute the "initiation of adversary judicial criminal proceedings" - events that do not involve the defendant's appearance before a judicial officer but that do require by rule the involvement of prosecutors.[13]

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[13] Both an indictment and an information must be signed by an attorney for the government, Fed. R. Crim. P. 7(c)(1), but the prosecutor's involvement in the grand jury's indictment process extends far beyond that ministerial role:

> [A] modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands. The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration. Although the grand jury may itself decide to investigate a matter or

At the same time, however, the Court has clarified that not every "'critical' pretrial event" comes with Sixth Amendment protection: "the possibility that [such an event] may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." Moran, 475 U.S. at 432. Rather, "[a]ttachment occurs when the government has used the judicial

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> to seek certain evidence, it depends on largely on the prosecutor's office to secure the evidence or witnesses it requires. The prosecutor also advises the lay jury on the applicable law.

United States v. Sells Eng'g Inc., 463 U.S. 418, 430 (1983) (footnote omitted); see also, e.g., In re Grand Jury Proceedings, 219 F. 3d 175, 189 (2nd Cir. 2000) (observing that the grand jury "is an accusatory body under the (almost) complete control of the prosecutor"); 1 Charles A. Wright & Andrew D. Leipold, Federal Practice & Procedure § 101, at 289 (4th ed. 2008) ("It is . . . easy to overstate the grand jury's independence from the prosecutor. It is the prosecutor who decides what investigations to pursue, what documents to subpoena, which witnesses to call, and what charges to recommend for indictment.").

If charged with a non-capital offense "punishable by imprisonment for more than one year," a defendant may be prosecuted by information, rather than indictment, if he waives his right to indictment. Fed. R. Crim. P. 7(b). An information is explicitly a prosecutorial undertaking; it is defined as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." Black's Law Dictionary 795 (8th ed. 2004). See, e.g., Rothgery, 128 S. Ct. at 2583; Moran v. Burbine, 475 U.S. 412, 429 (1986); Gouveia, 467 U.S. at 188; Kirby, 406 U.S. at 689.

machinery to signal a commitment to prosecute . . . ." Rothgery, 128 S. Ct. At 2591.

With these principles in mind, we turn Boskic's contention that the complaint filed by the agents in this case was "an accusation sufficiently formal, and the government's commitment to prosecute is sufficiently concrete" to trigger his Sixth Amendment right to counsel. Id. at 2589.

B. Boskic's Right to Counsel

In arguing that the complaint charging him with criminal activity triggered the Sixth Amendment, Boskic necessarily relies on the Supreme Court's longstanding inclusion of "formal charge," along with indictment and information, in the list of events that signal the start of a criminal prosecution. See, e.g., Rothgery, 128 S. Ct. at 2583 (noting that adversary proceedings may be initiated by "formal charge, preliminary hearing, indictment, information or arraignment") (citations omitted); Kirby, 406 U.S. at 689. A complaint prepared pursuant to Federal Rule of Criminal Procedure 3 is "a written statement of the essential facts constituting the offense charged," and it must be made under oath before a magistrate judge or other judicial officer. If the complaint and attached affidavits establish probable cause to believe that the charged offense has been committed by the defendant, "the judge must issue an arrest warrant to an officer authorized to execute it." Fed. R. Crim. P. 4(a). Boskic reasons that the complaint is the first

official accusation of criminal activity and that "the only logical conclusion" to be drawn from the issuance of an arrest warrant based on the complaint's showing of probable cause is that "the defendant has been formally charged with an offense."

The Supreme Court has never elaborated on what instruments beyond indictment and information would constitute a "formal charge" for purposes of the Sixth Amendment. However, every circuit that has considered the issue has concluded that a federal complaint does not qualify as such, primarily because of its limited role as the precursor to an arrest warrant. See United States v. Alvarado, 440 F.3d 191, 200 (4th Cir. 2006); United States v. Moore, 122 F.3d 1154, 1156 (8th Cir. 1997); United States v. Langley, 848 F.2d 152, 153 (11th Cir. 1988) (per curiam); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir. 1987); United States v. Duvall, 537 F.2d 15, 22 (2d Cir. 1976); see also United States v. Harris, 45 F.3d 431, (Table), 1995 WL 7958, at *2 (6th Cir. 1994) (per curiam) (unpublished); United States v. Santiago, 180 F. App'x 337, 339 (3d Cir. 2006) (unpublished).

We agree with these courts. The process of securing a federal criminal complaint does not involve the appearance of the defendant before a judicial officer. It is therefore unlike a preliminary hearing or arraignment. Nor does the process of securing a federal criminal complaint require, by statute or rule, the participation of a prosecutor. It

is therefore unlike the procedures for securing an indictment or information, which require the participation of a prosecutor and, in that sense, manifest the "commitment to prosecute" that is critical to the Supreme Court's Sixth Amendment jurisprudence. Rothgery, 128 S. Ct. at 2591.

Hence, it is not surprising that the Court has never listed a "complaint" – a commonly used method of initiating charges against suspected criminals – as one of the specifically enumerated examples of events that trigger the Sixth Amendment right. That omission reinforces our view that, at least under federal law, the complaint is not a "formal charge" in the relevant sense for triggering the Sixth Amendment right to counsel. The federal complaint serves merely as the prelude to an arrest warrant and does not move a case from the investigation phase to the point at which the defendant "finds himself faced with the prosecutorial forces of organized society." Kirby, 406 U.S. at 689; see also Alvarado, 440 F. 3d at 199 ("By its own terms, the Sixth Amendment applies to 'criminal prosecutions' as opposed to criminal investigation.[14]")

We recognize that access to counsel may be helpful before the Sixth Amendment right attaches,

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[14] The transition from investigation to prosecution occurred here a day after the interview, when Boskic made his first appearance before a judicial officer. At that hearing, where he was represented by counsel, Boskic was advised of the criminal charges against him and did not oppose detention.

particularly when suspects confront the custodial interrogations that are the hallmark of the investigative process. However, the Sixth Amendment is not directed at the risk of self-incrimination inherent in such confrontations; in those settings, suspects must instead rely on the Fifth Amendment and the prophylactic, now constitutionalized rule of Miranda.[15] The Sixth Amendment takes hold when the investigation gives way to a prosecution, broadly guaranteeing the defendant the assistance of counsel as he negotiates the intricate procedures of the adversary criminal system. "By its very terms," the Sixth Amendment "becomes applicable only when the government's role shifts from investigation to accusation." Moran, 475 U.S. at 430. That shift had not yet happened when Boskic entered the interview room.[16] Accordingly, we

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[15] In this case, of course, although Boskic was given Miranda warnings at the outset of the interview, he has never contended that he was in custody and entitled to the warnings when the interview began. His Fifth Amendment challenge to the admission of his statements is based on a due process/voluntariness argument rather than on the government's failure to comply with Miranda.

[16] Other arguments that Boskic offers in support of his Sixth Amendment claim have no merit. He asserts that the prosecution must have began with filing of the complaint because the clock started running for speedy trial purposes at that time. The Supreme Court has explicitly rejected that link between the Sixth Amendment's right to counsel and the right it provides to a speedy trial. See Gouveia, 467 U.S. at 190 (noting the different interests at stake: "While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest . . ."); United States v.

reject his claim that the Sixth Amendment provided him with a right to counsel at the outset of the interview.[17]

V.

Boskic also appeals his convictions on the ground that the district court improperly denied his

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Labara, 191 F.3d 60 (1st Cir. 1999), we did not address the issue because the government had assumed attachment of the right. Id. at 64; see also United States v. Hilarios-Hilario, 529 F.3d 65, 73-74 (1st Cir. 2008) (bypassing the question whether "criminal complaint begins adversarial proceedings triggering a right to counsel" because defendant waived any such right).

[17] Given our conclusion, we do not reach the question of Boskic's possible waiver of his Sixth Amendment right to counsel. We note, however, that a valid waiver of Fifth Amendment rights typically will suffice to accomplish a waiver of the Sixth Amendment right to counsel in the context of police questioning of a defendant. Patterson v. Illinois, 487 U.S. 285, 296 (1988). However the Fifth and Sixth Amendment rights to counsel are not coterminous, and a waiver sufficient for Fifth Amendment purposes will not necessarily waive the Sixth Amendment right. Id. at 296 n.9 ("[B]ecause the Sixth Amendment's protection of the attorney-client relationship – 'the right to rely on counsel as a "medium" between [the accused] and the State' – extends beyond Miranda's protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under Miranda will not suffice for Sixth Amendment purposes." (citation omitted)). As an example, the Court in Patterson noted that a Miranda waiver was sufficient "where a suspect was not told that his lawyer was trying to reach him during questioning," but stated that, "in the Sixth Amendment context, this waiver would not be valid." Id.

motion for judgment of acquittal. He contends that his failure to disclose his service in the Army of the Republika Srpska is insufficient evidence to establish that he made false statements in violation of 18 U.S.C. § 1546. We review rulings on motions for judgments of acquittal de novo, assessing whether a rational factfinder could have found each element of the offense beyond a reasonable doubt. United States v. Vazquez-Botet, 532 F.3d 37, 59 (1st Cir. 2008). We draw all reasonable inferences in favor of the verdict. Id. "We need not be convinced that a guilty verdict was the only one available on the evidence but merely that a plausible rendition of the record supports the verdict." Id. at 60 (internal quotation marks and citations omitted). Therefore, "evidence sufficient to support a guilty verdict may be entirely circumstantial, and the factfinder is free to choose among reasonable interpretations of the evidence." Id. (internal quotation marks and citations omitted).

The elements of a § 1546(a) violation are : (1) the defendant made a false statement, (2) the statement was made knowingly and (3) under oath, (4) the statement concerns a "material fact," (5) and the statement was made in an application required by the United States immigration laws and regulations. See 18 U.S.C. § 1546(a); United States v. Chu, 5 F.3d 1244, 1247 (9th Cir. 1993). Boskic explicitly challenges only the sufficiency of the evidence on the first element - whether he made false statements on his immigration forms. However, resolving that issue requires us to consider his

knowledge as well because, as we shall explain, whether his answers were false depends on his understanding of the questions asked of him. See e.g., United States v. DeZarn, 157 F.3d 1042, 1044 (6th Cir. 1998) ("[T]he crime of perjury depends not only upon the clarity of the questioning itself, but also upon the knowledge and reasonable understanding of the testifier as to what is meant by the questioning . . .").

A. Count One: Registration for Classification as a Refugee, Form I -590

On the Form I-590 provided to Boskic, there were nineteen questions that were posed simply. For example, question thirteen regarding the applicant's educational background was entitled "Schooling or Education." Beneath this heading was a table containing four rows and four columns. The columns were labeled "Name and location of school," "Type," "Dates attended," and "Tile of Degree or Diploma." Using all four rows provided for the response, Boskic furnished the request information about his educational background.

The next question, number fourteen, was entitled "Military Service." Like the prior question on educational background, there was a table under the heading "Military Service." This table had two rows and five columns. The columns were labeled: "Country," "Branch and Organization," "Dates," "Serial No.," and "Rank Attained." Two rows were provided for a response and Boskic used only one of

the rows. In response to country, he indicated "SFR Yugoslavia." He also indicated, as requested, that he had been in the infantry from 1983-1984 and he attained the rank of private. He did not indicate his serial number, instead putting a dash in this box. At the end of the form, the following oath was signed by Boskic: "I, _____, do swear (affirm) that I know the contents of this registration subscribed by me including the attached documents, that the same are true to the best of my knowledge . . . and that this registration was signed by me with my full, true name."

Boskic acknowledges that he did not include references to his service in the Army of the Republika Srpska in response to the question about military service on his Form I-590. However, he contends that the jury could not find him guilty of making a false statement because that omission did not constitute the false statement that is required here. He points out that the oath on the form required him to swear only that the responses were "true to the best of his knowledge" and not that they also were complete.

Boskic concedes that deliberately omitting required information may properly be characterized as making false statement in other context. See United States v. Wells, 519 U.S. 482, 485 (1997) (recognizing that concealing the nature of a company's contractual obligations from several banks can constitute knowingly making a false statement to a federally insured bank). He contends that were

a form does not explicitly require full disclosure, withholding information cannot be characterized as making a false statement under § 1546(a).

Boskic cites two cases in support of his position. In United States v. McCarthy, 422 F.2d 160 (2d Cir. 1970), the Second Circuit upheld the conviction of a union officer for making false statements by omission on a report filed with the Secretary of Labor. The oath on the pertinent report stated that the contents were "true, correct, and complete." Id. at 162. In the second case cited by Boskic, United States v. Mattox, 689 F.2d 531 (5th Cir. 1982), an employee who omitted information from an employment application was convicted of making a false statement. The instructions on the employment application required defendant to write down "all" his past employment, and the form contained a certification that the information on the form was "True and Correct." Id. at 532.

Boskic reads these cases for the proposition that defendant may be convicted for making a false statement by omission only if the underlying forms specify that the information provided is either true and complete or, alternatively, that all of the requested information has been provided. However, we read neither case as suggesting that the specific language used in the respective forms was necessary to the court's decision to sustain the conviction. The courts merely found that the cited language was sufficient. Indeed, we see no material difference between the language used in the Form I-590 here

and the language used in the forms in McCarthy and Mattox. The Form I-590 stated that "I _____, do swear (affirm) that I know the contents of this registration subscribed by me . . . are true to the best of my knowledge."

Our precedent confirms that the language proffered by Boskic as necessary for a conviction is not required. We have, in fact, upheld false statement convictions when the forms at issue did not have the language cited by Boskic. In United States v. Concemi, 957 F.2d 942 (1st Cir. 1992), defendants were charged with making false statements to a federally insured bank in violation of 18 U.S.C. § 1014. Id. at 944. The government alleged that the defendants had knowingly executed HUD-1 certificates that omitted information about pertinent secondary mortgages. The oath on these certificates stated: "The HUD-1 Settlement Statement which I prepared is a true and accurate account of this transaction." Id. at 947 n.7. This oath simply required the defendant to attest to the truth and accuracy of the information provided. The oath did not certify that the information was true and complete nor was there any reference to "all." Nonetheless, we found that this oath was sufficient to uphold the denial of a motion for judgment of acquittal on a charge of making false statements that took the form of omissions. Id. at 950.

Similarly, in United States v. Leach, 427 F.2d 1107 (1st Cir. 1970), we held that defendants who omitted information on forms for a home

improvement loan while swearing that the information provided was true were guilty of making false statements in connection with an application for home improvement loan. Id. at 1111. In neither case did we indicate that it was problematic that the oath on the form did not explicitly require the applicant to attest to the completeness of his response. As such, our precedent establishes that a jury can properly find that the defendant made a false statement by swearing that the incomplete answers to questions on a form are truthful even if the defendant does not also swear that he responds to the questions on the form are complete.

There is nothing unfair or illogical about this approach. While some forms might add "all" or "complete" to the description of information sought, the absence of those words does not suggest that only partial information is sought. A request on a form that says "military service" plainly means that the details of all prior military service should be furnished. Indeed, Boskic's response to question thirteen, listing all of his educational background in response to a similarly framed inquiry into his education and schooling, indicates that Boskic understood a complete response was requested. Also, he submitted the form in Serbo-Croatian, as well as in English. Therefore, his understanding of what was asked of him was not limited by any lack of familiarity with the language in which the form was written.[18] Accordingly, we affirm the district court's

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[18] Francis Monin, the Immigration Officer who interviewed Boskic in Germany and processed his application,

denial of the motion to acquit on Court One because a reasonable jury could have found that Boskic made a false statement about his military service on his Form I-590. See United States v. Hatch, 434 F.3d 1, 6 (1st Cir. 2006) ("The government proved, and a rational jury found beyond a reasonable doubt, that the only sensible reading of [the question] demanded that [the defendant] report his entire . . . history.").

B. Count Two: Application to Register as a Permanent Resident or Adjust Status, Form I-485

Boskic also challenges the sufficiency of the evidence on Court Two, which alleged that he knowingly made a false statement under oath concerning a material fact on his application for permanent resident status. Again, the statement at issue was Boskic's omission of his service in the Army of the Republika Srpska. This time, the response was to question fourteen in Part C of Form I-485. This instructions on the form stated:

> List your present and past membership in or affiliation with every political organization, association, fund, foundation, party, club, society or similar group in the United States or in other places since your 16th birthday.

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testified that applicants submitted their forms in both their native language and English. The applicants had the responsibility to obtain the English translations.

> Include any foreign military service in this part. If none, write 'none.' Include the name(s) of the organization(s), location(s), dates of membership from and to, and the nature of the organization(s). If additional space is needed, use a separate piece of paper.

Boskic does not argue, because he cannot, that the question as written did not require a complete answer or that it was ambiguous with respect to the information requested. The question explicitly asks that Boskic provide his membership and affiliation with every organization listed. Although the use of "any" to modify "foreign military service" could, in a different context, suggest that listing some but not all past military service would suffice, in this context such a reading is not possible.[19] This question demands that the applicant list every past organizational affiliation or membership. The reference to "any foreign military service" indicates that all memberships or affiliations with a foreign military must be listed.

Instead, Boskic argues that the district court erred in denying his motion for a judgment of acquittal on Court Two because the government's own evidence suggests that he was responding to the question as it was posed to him by the IRC volunteer,

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[19] The Oxford English Dictionary provides multiple definitions for the word "any." Depending on the usage, "any" can mean "all" or it could connote "some."

Dr. Gehani, who testified that she did not read the questions on the form verbatim. Boskic reasons that since he was responding to the question as paraphrased by Gehani, and the exact wording of that paraphrase is unknown, he cannot be found guilty of making a false statement. He invokes the doctrines of fundamental ambiguity and literal truth in support of his contention. See United States v. Richardson, 421 F.3d 17, 32-34 (1st Cir. 2005).

Because the falsity of an answer must be evaluated with reference to the question asked, see Bronston v. United States, 409 U.S. 352, 355 n.3 (1973), we begin by considering the content of the question that triggered Boskic's allegedly false response.

1. What was the question?

As an initial matter, we reject Boskic's assertion that he may not be found guilty because there was no reliable evidence of the question Gehani asked him. The government offered two possible scenarios for determining the question posed. It attempted to show that Boskic had read and understood the form itself, which would have allowed the jury to attribute to him knowledge of the question as asked on the form irrespective of Gehani's translation. Alternatively, the government elicited testimony from Gehani about her customary practice in translating question fourteen, see infra, and the jury could have concluded that she followed that practice with Boskic. Whether the question

asked by Gehani was "fundamentally ambiguous," precluding a finding that Boskic's answer to it was false, is a separate issue that we take up only after discussing whether the relevant inquiry should focus on her question or the form's.

a. Did Boskic read and understand the I-485?

The government maintains that the jury could have found that Boskic read Form I-485 himself and that his English skills were sufficiently developed for him to understand that Form I-485 called for a response that included his service in the Army of the Republika Srpska. There are multiple problems with this argument.

Most significantly, the record lacks evidence that Boskic was capable of reading and understanding the I-485, which was submitted only in English. Although he unquestionably had acquired some ability to communicate verbally in English by the time he completed the form about a year after arriving in the United Sates, the government cites no evidence that he had written language skills at that time. It points out that Boskic checked off that his English ability was "Good" on another government form he completed the same day as the I-485, and that he had been employed as a cashier at a K-Mart, "confirm[ing] that he had the ability to communicate in English on at least a functional level." The government further cites telephone conversations with the IRC about the

status of his application. However, none of this evidence speaks to Boskic's written language ability.

In addition, unlike his experience with immigration forms he completed in Germany, there is no evidence that Boskic had access to a Serbo-Croatian or Bosnian version of the I-485. Boskic had submitted the I-590 in Germany in both English and Serbo-Croatian. Immigration Officer Monin, who interviewed Boskic in Germany, testified about another document that Boskic submitted there, the G-646, which asked applicants to confirm that they were not within any of sixteen inadmissible classes of aliens. The record contains Serbo-Croatian and English versions of the G-646 that were signed only by Boskic and a third version of the form, written in Bosnian, that was signed by Monin as well. Monin explained that, consistent with his usual practice, his signature would appear on the version of the form that the applicant signed in his presence after reading it. Thus, in Germany, Boskic read and relied on forms written in Serbo-Croatian or Bosnian.

Nor did Gehani's testimony provide any basis for an inference that Boskic had read the I-485 independently. Gehani wrote the answers on the form, and her testimony did not indicate that Boskic read along as she proceeded through the questions. The record is also silent as to whether Boskic read either the questions or the responses written by Gehani before he signed the document. Gehani testified that, even when her clients spoke English, she would complete the forms for them when they

"were illiterate or they just didn't have a good command of written English."

The record thus contains insufficient evidence to permit the jury to conclude that Boskic had read and understood the I-485 form on his own.[20]

B. What Question Did Gehani Ask?

The question then becomes whether the jury could reasonably conclude that Boskic responded to a specific paraphrase of the form's question by Gehani. Gehani testified that she had no recollection of her particular encounter with Boskic, including whether he was accompanied by an interpreter. Although she stated that she did not use precisely the same wording each time she paraphrased, she testified that her customary practice with respect to Part C's question fourteen was to ask "clients if they had ever been in the military or in any political group either here or in another country." This evidence, viewed in the light most favorable to the verdict, permitted the jury to conclude that this customary question was the question Gehani asked Boskic. Indeed, it is the only version of the question that is supported by the record. Moreover, Gehani's customary paraphrase of the question – which does not explicitly ask Boskic to report all of his military service – is favorable to Boskic, who does not dispute that Gehani ask him some question about his military background. We therefore must determine whether Boskic could be

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[20] One judge on the panel disagrees.

found guilty on Count Two because he responded to Gehani's question by reporting only his service in the Yugoslav Army.

2. Was Boskic's response on the Form I-485 false?

a. Fundamental Ambiguity

Boskic argues that he could not be found guilty for responding as he did to Gehani's question because he was asked only whether he had "ever" been in the military. He suggests that it was reasonable for him to conclude that disclosing any military experience was an appropriate and truthful response to that question,[21] and he relies on case law holding that a defendant may not be found guilty of making a false statement based on jury speculation about how the defendant understood a fundamentally ambiguous question. See, e.g., Richardson, 421 F.3d at 33 (holding that, in the case of a fundamentally ambiguous" question, "'we cannot allow juries to criminally convict a defendant based on their guess as to what the defendant was thinking at the time the response was made'" (quoting United States v. Manapat, 928 F.2d 1097, 1101 (11th Cir. 1991)).

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[21] Boskic argued in his reply brief that the evidence showed that his forced participation in the Army of the Republika Srpska was outside the scope of the question about military service. Arguments advanced for the first time in reply brief are deemed waived, United States v. Marti-Lon, 524 F.3d 295, 299 n.2 (1st Cir. 2008), and we therefore do not address that contention.

The flaw in Boskic's argument is that the question that he was asked was not "fundamentally ambiguous." We have recognized a distinction between questions that are "truly ambiguous" and those that are "arguably ambiguous," and have held that only the former prevent a jury from deciding that the defendant's response was false. See Richardson, 421 F.3d at 33. Although we acknowledged the impossibility of "'defin[ing] the point at which a question becomes fundamentally ambiguous, and thus not amenable to jury interpretation,'" id. at 34 (quoting United States v. Farmer, 137 F.3d 1265, 1269 (10th Cir. 1998)), we endorsed a suggested formulation:

> A question is fundamentally ambiguous when it "is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony."

Id. (citations omitted). We have also posed this threshold question differently, asking in United States v. Rowe, 144 F.3d 15, 21 (1st Cir. 1998), if the record revealed any "objectively reasonable interpretation of the question under which the answer is not even false." See also United States v. Prigmore, 243 F.3d 1, 17-18 & n.2 (1st Cir. 2001) (citing Rowe for the proposition that defendants'

intent should be assessed based on an interpretation of the pertinent statutory requirements that is "most congenial to their case theory and yet also objectively reasonable").

Although phrased differently, these inquires serve the same purpose in a perjury or false statement trial involving an ambiguous question. They are questions that the court should pose to itself in deciding whether a reasonable jury, given the language of the question to the defendant and the context in which it was asked, could conclude beyond a reasonable doubt that the defendant knew that the answer he gave was false. We have no reservations about concluding that a reasonable jury could make that determination here.

Question fourteen as paraphrased by Gehani was susceptible to two straightforward interpretations; it asked either for "sample" military service or for all such service. The question for the jury was thus whether, despite the ambiguity of Gehani's language, Boskic knew that the Form I-485 asked him to disclose all of his military service and, hence, he knew that he had made a false statement by omitting his service in the Army of the Republika Srpska. The jury's task was to "examine 'the question and answer . . . in the context of the investigation as a whole and the state of the defendant's knowledge.'" Richardson, 421 F.3d at 32 (quoting DeZarn, 157 F.3d at 1048); see also id. at 33 ("In determining whether a statement made in response to an ambiguous question could be said to

be false, 'the context of the question and answer becomes critically important.'") (quoting Farmer, 137 F.3d at 1269).

The district court properly charged the jurors with that specific task, directing them to determine how Boskic understood the question he was asked:[22]

> So what are you doing? What you're doing is asking what does this question ask? What was the question that was actually put to him? And because we have evidence regarding the way in which these questions were asked and the circumstances in which they were presented, you're going to have to . . . imaginatively project yourself into these circumstances. There has been a suggestion that an interpreter or translator paraphrased

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[22] The jury instructions also relied on language from Rowe, telling the jurors that, "[i]f a question on the form at issue can be interpreted in more than one way, the Government must prove that the defendant's answer was false under any reasonable interpretation." See Rowe, 144 F.3d at 21. However, as we read our precedents, the question of objective reasonableness was for the judge to decide in considering whether the government had presented enough evidence to allow the jury to find the statement false. See Prigmore, 243 F.3d at 18 n.2 (recognizing that "a reasonableness determination sometimes requires preliminary resolution of factual disputes," but that, "as a legal question, the reasonableness of defendants' understanding is ultimately a question for the judge").

the questions in some fashion. You'll have to evaluate whether or not the substance of the question was presented to Mr. Boskic, and in response he responded falsely as the Government claims.

Now, with respect to Count 1 and 3, the Government says that the falsehood is an answer which can only reasonably be read to say that he belonged to the Yugoslav National Army and no other. So, you'll look at this question, the form in which the question is presented, and then you will think about how was the question actually presented to him, and then you'll think about did he know that what he was saying was false . . .

You turn to Count 2. And it focuses on the same kind of question, but you'll have to look at it very carefully regarding military. How was it understood by the defendant? Was his answer inaccurate, false, and did he know it to be false?

Given the context, the jury's judgment that Boskic's response was false is unassailable. The Form I-485, like the Form I-590, requested the details of the applicant's background. The jurors were entitled to factor in Boskic's earlier experience

with the I-590, which they supportably found to require disclosure of his entire military history, when considering his knowledge of the information about his military service sought by the government a year later. They also heard the critical evidence that Boskic had been advised in Germany to avoid disclosing his service in the Army of the Republika Srpska to immigration authorities, and that he had said to FBI Agent Hughes, "if you had a woman that you loved and wanted to be with her, wouldn't you lie to keep her?" Based on that evidence and his prior experience, and notwithstanding Gehani's imprecise paraphrasing, the jury reasonably could find that Boskic understood that the question posed by Gehani demanded disclosure of all of his military activity. Hence, the jury properly found that Boskic's incomplete answer to question fourteen on Form I-485 constituted a false statement that he had served only in the Yugoslav Army. See Hatch, 454 F.3d at 6 ("The government proved, and a rational jury found beyond a reasonable doubt, that the only sensible reading of Question 18 demanded that Hatch report his entire OUI history.").

b. Literal Truth

The literal truth defense articulated in Bronston v. United States, 409 U.S. 352 (1973), arose from the Supreme Court's recognition that witnesses facing interrogation will at times give misleading answers when under pressure to respond. The Court observed that "[s]ometimes the witness does not understand the question, or may in an excess of

caution or apprehension read too much or too little into it." 409 U.S. at 358. Insisting that "[p]recise questioning is imperative as predicate for the offense of perjury," id. at 362, the Court held that "a jury could not be allowed to consider a perjury charge where the allegedly false statement was 'literally true but not responsive to the question asked and arguably misleading by negative implication.'" Richardson, 421 F.3d at 33 (quoting Bronston, 409 U.S. at 353). In such instances, the questioner bears the burden to clarify the statement through additional inquiry. Bronston, 409 U.S. at 358-59. ("If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."); United States v. Reveron Martinez, 836 F.2d 684, 690 (1st Cir. 1988) ("Since the matter was contemporaneously pursed, the government is saddled with what was said rather than what might have been meant.").

The literal truth defense is inapplicable to the facts of this case, where the focus is on the ambiguity of the question asked. Bronston involved an unambiguous question, and a non-responsive answer that was literally true but misleading by negative implication.[23] That negative implication created an

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[23] In Bronston, the defendant had been asked while testifying under oath at a bankruptcy hearing if he currently had any accounts in Swiss banks. 409 U.S. at 354. He answered no and then was asked if he ever had had such accounts. He replied: "The company had an account there for about six months, in Zurich." Both answers were true, although the defendant also had previously had answer to the second

ambiguity in the response, which the questioner failed to resolve through appropriate follow-up questions. It is in that sense that the Bronston court explains the importance of precise questioning by the examiner.

Indeed, we question whether the literal truth defense as articulated in Bronston is appropriately invoked outside the context of adversary questioning. The Court expressly stated in Bronston that the defendant's response to "testimonial interrogation" should not "be measured by the same standards applicable to criminally fraudulent or extortionate statements." Id. at 358 & n.4. The Court elaborated:

> In that context, the law goes "rather far in punishing the intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representation." In contract, "under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer."

Id. at 358 n.4 (quoting Model Penal Code).

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question that there was never a personal bank account," 409 U.S. at 357, but concluded that the lawyer should have followed up "to pin the witness down to the specific object" of the inquiry, id. at 360.

At its core, Bronston is a reminder to the government that testimonial interrogation permits the government to resolve the ambiguities created by nonresponsive answers with follow-up questions. The government may lose the opportunity to have a jury resolve the ultimate question of falsity if it is not alert to the need for those follow-up questions. However, whether or not the literal truth defense is generally inapplicable to non-testimonial statements, it does not assist Boskic in this case. There is no basis for disturbing the jury's verdict on Count II.

Affirmed.

United States District Court, D. Massachusetts

UNITED STATES of America
v.
Marko BOSKIC.

Criminal No. 04-10298-DPW

June 2, 2006.

Max D. Stern, Stern, Shapiro, Weissberg & Garin, Boston, MA, for Defendant.

Jeffrey Auerhahn, Kimberly P. West, United States Attorney's Office, Boston, MA, for Plaintiff.

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, District Judge.

Defendant Marko Boskic, accused in five counts of making false declarations on immigration applications and in an interview with federal agents in violation of 18 U.S.C. §§ 1546(a) and 1001, moves to suppress statements made to the federal agents in a staged immigration interview on August 25, 2004 and all evidence seized in a search at his home that day. He also moves to dismiss Count Five of the indictment, the § 1001 count alleging that he was trapped into making perjurious statements made during the interview. I find that Boskic's statements were voluntary and that the Government's carefully contrived and executed plan did not violate principles of fundamental fairness. I will therefore deny both

motions.

I. FINDINGS OF FACT

Having afforded the parties a full opportunity to develop the record in these matters, I find the following.

A. The Underlying Offenses

Defendant Marko Boskic, a Bosnian-Croat who is currently a permanent resident of the United States, is alleged to have lied to United States authorities about his involvement in ethnic conflict that took place in the former Yugoslavia between 1992 and 1995.

Boskic filed an I-590 Application for Registration for Classification as Refugee in Germany on February 17, 2000. His application was approved and he immigrated to the United States in 2000, settling in Peabody, Massachusetts where he worked in construction. On or about April 5, 2001, Boskic filed an I-485 Application to Register Permanent Residence or Adjust Status, which was approved on June 29, 2002.

Count One of the indictment alleges that Boskic falsely stated on his application for refugee status, and Count Two alleges he falsely stated on his application for permanent residency, that he had only served in the Yugoslavia Army from 1983-1984, when he knew that he had in fact also served in the

Army of the Republika Srpska in the 1990s. Count Three alleges that Boskic falsely indicated on his application for refugee status, and Count Four alleges he falsely stated on his application for permanent residency, that he had never ordered, assisted, or otherwise participated in the persecution of any person because of race, religion and political opinion, when he knew that he had in fact participated in the massacre of Muslim men at the Branjevo Military Farm outside Srebrenica as part of the 10th Sabotage Detachment of the Army of the Republika Srpska.

Count Five alleges that Boskic again lied about his military service record to federal agents in an interview on August 25, 2004 in Boston, Massachusetts.

B. The Government's Plan

In the fall of 2002, the Joint Terrorism Task Force ("JTTF") in Boston opened an investigation of Boskic. The JTTF is composed of representatives from numerous federal and state agencies including Immigration and Customs Enforcement ("ICE"), the Federal Bureau of Investigation ("FBI"), and the United States Attorney's Office. FBI Agent Greg Hughes was assigned to the investigation in August 2002, and ICE Agent Thomas Carroll was assigned to the investigation in December 2003. Assistant United States Attorney ("AUSA") Kimberly West became involved in the Boskic investigation at some point.

Agent Carroll was initially assigned to investigate whether Boskic had committed "immigration fraud." One of the investigative goals was to determine whether Boskic had performed additional undisclosed military service in Bosnia. Specifically, the investigation focused on whether Boskic made materially false statements on his applications for refugee status and for permanent residency when he did not reveal his participation in the conflict in the former Yugoslavia as a member of the 10th Sabotage Detachment of the Army of the Republika Srpska.

In late December 2003 or early January 2004, JTTF representatives contacted Peter McCloskey, a Senior Trial Attorney with the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), to request ICTY's "help" with the JTTF investigation of Boskic. At some point, Alistar Graham, who had been investigating for the ICTY alleged war crimes that occurred in and around Srebrenica, first as a Senior Investigator from 1998 to 1999 and later as an Investigations Team Leader from 2001 to 2004, was assigned as the ICTY representative to assist the American authorities. Graham subsequently came to the United States in August 2004, primarily to assist the JTTF with its investigation of Boskic, but also to seek Boskic's cooperation with the ICTY's ongoing investigations of senior military officials involved in the Srebrenica massacres. Through his work as an ICTY investigator, Graham had collected evidence

that identified Boskic as a member of the 10th Sabotage Detachment of the Army of the Republika Srpska.

In December 2003, Agent Carroll requested Boskic's A-file[1] and information on any open applications. He learned that Boskic had filed an application for travel documents, which the former Immigration and Naturalization Service ("INS") received on September 3, 2002. The immigration service center had yet to adjudicate the application, a process which usually takes about six months. Agent Carroll pulled the application out of the queue in January 2004.

Sometime thereafter, Agent Carroll, Agent Hughes, and AUSA West devised a plan whereby Boskic would receive a notice to appear at the JFK Federal Building in Boston, Massachusetts for an interview concerning the application for travel documents. The government agents had no intention of issuing travel documents to Boskic. Rather, their true purpose was to interview Boskic in connection with their ongoing investigation about his history prior to coming to the United States.

On March 23, 2004, Agent Carroll sent Boskic a generic form called a G-56 Call-In-Notice. The form requested that Boskic appear at the JFK Building, Room No. E-170, where immigration

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[1] An A-file is a record on a foreign resident that contains the whole immigration history of the alien, including all of the applications he or she has filed with immigration authorities.

interviews take place, on Friday, April 2, 2004 at 3:30 p.m. The form indicated that the reason for the appointment was: "Form I-131, Refugee Travel Document Filing, LIN-02-276-51148." The plan was that Agent Carroll and Agent Hughes would question Boskic about his history in Bosnia in the interview. On April 2, 2004, Agent Carroll and Agent Hughes waited for Boskic to appear at the JFK Building without an interpreter, but as expected, Boskic did not appear because he faced unrelated criminal matters. A few days later, Boskic came to the JFK Building to apologize for having missed the appointment. He asked that the immigration authorities send him another notice.

On August 9, 2004, Agent Carroll sent Boskic another G-56 notice requesting he appear at the JFK Building for an interview regarding his application for refugee travel documents, this time for August 25, 2004 at 3:30 p.m. Graham was summoned from the Hague to come to Boston for the interview and a Serbo-Croatian interpreter was brought in from Washington, D.C.

AUSA West, Agent Carroll, Agent Hughes, and Graham spoke on the telephone and then met, at least once, to plan how they would conduct the interview. The decision was made to have an arrest warrant in place, unbeknownst to Boskic, prior to the time he arrived for the interview.

According to Agent Carroll, the government agents believed that if Boskic knew that he was

under investigation, he would probably not talk. Consequently, they devised the following plan to elicit the information they desired from Boskic about his military history, while shielding the fact that he was under investigation and that an arrest warrant had already been acquired.

The plan was to start the interview with only Agent Carroll in the room. Agent Carroll would simply begin by asking Boskic about why he wanted travel documents to get Boskic talking. According to Agent Carroll, the agents anticipated that this would lead to the questions of what he did in Europe before he came to the United States, which would lead to questions about whether Boskic had a criminal record. The questions about the criminal record would provide the occasion for Agent Carroll to bring Agent Hughes into the room because Agent Carroll would tell Boskic that when a criminal record comes up, the applicant must be interviewed by the FBI, even though that would not always be the case. Finally, Graham and an interpreter would be brought in to extract the real substance of Boskic's knowledge of and involvement in the 10th Sabotage Detachment.

In addition to staging the sequence of the interviews, the agents planned to shield the extraordinary nature of the interview by not using the video-camera that was set-up in the interview room or the Serbo-Croatian interpreter at the outset, even though she would be available throughout. Although these measures would have preserved a

more accurate record, the agents were concerned that they might have caused Boskic to suspect that this was not an ordinary interview for travel documents.[2]

C. The Execution of the Government's Plan

1. The Arrest Warrant

On August 25, 2004, prior to the scheduled interview of Boskic, Special Agent Greg Nevano applied for and obtained a criminal complaint and an arrest warrant for Boskic for two counts of immigration fraud.

2. The Interviews, Consents, and Waivers

Boskic arrived at the JFK Building for his travel document interview at approximately 3:00 p.m. on August 25, 2004.

(a) The Interview by Agent Carroll – Around 3:30 p.m., Agent Carroll went to the interview room reception area and called for Boskic. Boskic

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[2] The agents theorized that Boskic might know that immigration agents generally only record interviews when they are going to deny benefits, and they did not want Boskic to think he was on the verge of being denied because it might cause him to suspect that he had been or was being investigated. Similarly, the agents were worried that since interpreters are generally not made available for immigration interviews-if someone needs an interpreter, they are told to bring their own-the presence of an interpreter might cause Boskic to wonder if there was something else going on.

identified himself. After Agent Carroll introduced himself simply as "Tom Carroll," he proceeded to escort Boskic down the hallway behind the reception area to Interview Room 24. They exchanged small talk along the way. Upon arriving in Room 24, Agent Carroll located himself across from Boskic behind the desk.

Agent Carroll asked Boskic to remain standing so that he could administer the oath. After reciting the oath, Agent Carroll asked Boskic to sit and he read Boskic his rights in English from a two-sided Miranda rights form that had been prepared in advance.[3] Agent Carroll asked Boskic to sign the English side of the form, which he did. After Agent Carroll put the time (3:35 p .m.), date (9/25/05), and location (Boston, MA) on the English side, he asked Boskic to read, sign, and date the Serbo-Croation version, which Boskic did.[4] Agent Carroll asked

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[3] The form was titled "UNITED STATES DEPARTMENT OF JUSTICE," Immigration and Naturalization Service, *Warning As To Rights."* The form provided the standard Miranda warning except that it added a specification: "[a]nything you say can be used against you in court, *or in any immigration or administrative proceeding."*(emphasis supplied). The interpreter had translated the form beforehand and the agents had photocopied the English version and the typed translation in a way to make one two-page document, with English on one side and the Serbo-Croatian translation on the other

[4] I do not credit Boskic's testimony that Agent Carroll did not show him the INS rights form until 8:20 p.m. Boskic acknowledged that it was his signature on both sides and that he wrote in 3 35 on the Serbo-Croation side. He explained, however, that the time corresponds to when the interview

Boskic if he agreed with what he had read and Boskic indicated that he agreed and understood.

Agent Carroll proceeded to explain that the purpose of the interview was to "go over" his application for a re-entry permit. Boskic believed him and, as the Government concedes, it was reasonable for him to do so. Agent Carroll first asked to see Boskic's passport and Massachusetts identification, which Boskic produced. Agent Carroll then asked Boskic "biographical" questions, such as name, date of birth, social security number, current address, when he came into the United States, and why he was applying to travel, for about forty-five minutes. Boskic answered all of Agent Carroll's questions because, as he explained, "Mr. Carroll ... works in the immigration status and he's in charge of

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began, not when he was given his rights and signed this form. I do not find this contention credible. It does not make sense that Boskic would write down the time that the interview started instead of the actual time he signed the form when he did the opposite on the Consent To Search form he acknowledges he signed at 6:45 p.m. as indicated on the form.

Contrary to the defense's contention, the introduction of Miranda rights at the outset is not necessarily inconsistent with the plan to hide the true nature of the interview. Although Boskic was not in custody when the interview began-and as a result Agent Carroll was not required to "Mirandize" Boskic-the agents plainly sought to protect the fruits of their efforts in case Boskic challenged their surreptitious strategy, as he now does. The agents were apparently willing to risk that Boskic would not be surprised or suspicious about receiving Miranda warnings on an INS form, in addition to an oath, at the outset of an immigration interview.

me and I thought that I had to answer his questions."

While Boskic was answering the preliminary biographical questions, Agent Carroll examined Boskic's passport and determined that he did not need a travel document to travel outside the United States because his passport was valid and it had an I-551 stamp showing that he was a permanent resident of the United States. Despite Agent Carroll's observation, which he relayed to Boskic, Boskic insisted that he wanted a travel document because a friend had told him that he could not travel on his Bosnian passport, even if his passport was still valid according to the date on the passport itself, because Bosnia and Herzegovina had issued a new series of passports since his was issued. Consequently, he remained and the interview proceeded.

Agent Carroll asked Boskic whether he had any military experience. Boskic indicated that he had fulfilled the two-year mandatory military service for the Yugoslav Army in 1983-1984. Agent Carroll then asked if he had any additional military history; Boskic denied that he did. Next, Agent Carroll asked Boskic whether he had a criminal record in Bosnia. When Boskic denied having such a record, Agent Carroll stated that "we" have information that Boskic had a criminal outside the United States and produced a copy of his Bosnia criminal record. He then stated, as planned, that whenever questions about a criminal record are raised, the FBI must be

brought in. Accordingly, Agent Carroll left the room and returned about a minute later with FBI Agent Hughes.[5] Agent Carroll then gave what he called a condensed version of the Miranda rights in English and reminded Boskic that they were still in effect. Boskic started to stand up and raise his right hand as if to take an oath again, but Agent Carroll indicated that he did not need to because he was still under oath.

(b) The Interview by Agent Hughes – Agent Hughes took the seat behind the desk and Agent Carroll sat next to Boskic. Agent Hughes's first question to Boskic was "[w]here are you from?" When Boskic replied "Bosnia," Agent Hughes asked, "were you in the war?" After receiving a negative response, he moved on to ask questions about Boskic's criminal record in Bosnia. Agent Hughes showed Boskic a document he said he had received from the Bosnian government and asked Boskic whether he had put these arrests on his immigration form. Boskic tried to explain that the charges had happened a long time ago and that they had been dismissed. He

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[5] Contrary to his testimony, I find Boskic must have become at least suspicious that the interview was not just about the travel documents when Agent Hughes entered the room and began to question him about his criminal history in Bosnia. I credit Agent Hughes's testimony and Agent Carroll's written report that later that evening Boskic said that he "knew what this was about when the FBI came in." I find further, however, that Boskic did not have any of the suspicions caused as a result of the presence the FBI fully confirmed until Alistair Graham of the ICTY introduced himself.

specifically stated that the alleged shooting in 1995 was not him because he was not in Bosnia at the time and that the Muslims in charge made up one of the other charges because he would not join the military. This questioning by Agent Hughes lasted about fifteen minutes.

As planned, Agent Hughes then announced that there was yet another person who wanted to speak to Boskic. Agent Hughes left the room and returned with Graham and a Serbo-Croatian interpreter.

(c) The Interview by Graham – Graham took the seat behind the desk. Agent Carroll again reminded Boskic that his rights were still in effect. After introducing himself as an investigator from the ICTY and the interpreter, Graham first asked if Boskic would prefer to continue the interview using the interpreter; Boskic accepted the offer. Graham then told Boskic not to say anything and just listen to what Graham had to say. For about ten minutes, Graham proceeded to explain his investigative work concerning the events in and around Srebrenica. He explained that he knew about the 10th Sabotage Detachment and that he knew that Boskic had been a member of that unit. He then explained that he had video footage of Boskic in the unit. When he finished, he explained to Boskic that he was not the subject of his investigation.[6] Graham said he was

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[6] Graham testified that he used the phrase "my investigation." I find Boskic did not understand that Graham's investigation was different from the investigation of the American officials in the

there on behalf of the ICTY to seek Boskic's cooperation in the investigation of senior officials.

Graham asked Boskic if he wanted to talk to him or if Boskic preferred to see the video of the 10th Sabotage Unit first. Boskic chose the latter and Graham played a CD that was already loaded in the computer on the desk in the interview room. After watching a portion of the video showing an awards ceremony for the 10th Sabotage Unit, Boskic identified himself in the video and said that he knew this day would come. Graham then repeated that Boskic was not the subject of his investigation, that he only wanted his cooperation. Boskic agreed to cooperate and even go to the Hague if he had to. After describing his participation in the Branjevo Military Farm massacre, Boskic said that "if he was to go down for what happened, others would go down as well."

For about an hour, Graham and Boskic discussed the events at Srebrenica and Boskic's participation. When the interpreter asked for some water everyone took a break and snacks were offered.

(d) The Joint Interview and Consents to Search – Upon return, Agent Hughes sat behind the desk and the three officials took turns asking questions.

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room. Neither Agent Hughes nor Agent Carroll said anything to alert Boskic to the fact that Graham's assurances did not pertain to any investigation they were conducting.

All three officials used the interpreter to translate their questions into Serbo-Croatian and the interpreter translated Boskic's answers that were more than yes or no.

At about 6:45 p.m., Agent Hughes asked Boskic if he knew of any other people involved in Srebrenica who were located in the United States. Boskic said he did not but he offered that he had names and addresses of people abroad at his apartment. Rather than accept Boskic's offer to take them to his apartment, Agent Hughes asked that Boskic permit agents to search his home. Boskic agreed and signed a Consent to Search form that had already been translated into Serbo-Croatian. He gave the agents a key to his apartment. Shortly thereafter, at about 7:00 p.m., the main office lights shut off automatically. Nobody else was left in the office so the agents got lamps from other offices to create enough light to continue the interview.

Later in the evening, when other agents went to Boskic's apartment they called Agent Hughes and asked if they could also look in Boskic's car. Boskic agreed that they could and Agent Hughes wrote down "Blue Dodge Intrepid 4316XN" on the Consent to Search form. Boskic and Agent Hughes initialed the addition.

(e) The Written Statement – When the questioning of Boskic was over, Agent Hughes suggested that Boskic should write down his statement. Boskic was hesitant, but after 10 or 15

minutes of listening to Agent Hughes and Agent Carroll explain the benefits to him of putting his story in his own words rather than relying on their version of his story, he agreed to make a written statement. None of the agents warned Boskic at this point that his statement might be used against him. Agent Hughes did, however, remind Boskic that he did not have to write down the statement. Agent Hughes dictated the first two sentences,[7] which the interpreter then translated into Serbo-Croatian. Boskic wrote down the translation as dictated. When asked whether he understood that writing the statement was voluntary Boskic replied in English: "If I'm writing this down, I know what I'm doing."

Starting at about 7:00 p.m., Boskic proceeded to write a six-page statement in Serbo-Croatian with the assistance of Agents Hughes and Carroll through the interpreter. Graham also assisted with names and places, but he was in and out of the interview room during the writing process. The parties took another break at some point, but continued this interactive writing process until about 8:20 p.m., when Boskic asked Agent Carroll what was going to happen to him.

3. The Arrest

At approximately 8:20 p.m., when Boskic was about halfway finished with his statement, Agent

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[7] The two sentences dictated by Agent Hughes are as follows: "I, Marko Boskic, understand and give up my rights. I am giving this statement voluntarily, without promises and guarantees."

Carroll responded to Boskic's inquiry saying, "you will be held overnight and we'll take you before a judge in the morning." Boskic then asked "[a]m I going to be arrested?" Carroll responded, "yes" and said it was for "violating immigration laws." At this point, Boskic understood that he was being arrested "because of the war in Bosnia," but he may not have completely understood the charges against him. After a few minutes, Boskic continued to write his statement because, as he testified, he had already "said everything."

When Boskic was finishing his statement, Agent Hughes suggested that Boskic write something down about lying on his immigration forms since he put the "other stuff" down. Boskic refused to write anything on this subject, although he told Agent Hughes something about lying in order to be with someone he loved.

At approximately 10:20 p.m., Boskic was formally placed under arrest, handcuffed with leg restraints, and transported to Suffolk County House of Corrections.

II. CONCLUSIONS OF LAW

Boskic moves to suppress the statements he made to Agent Carroll, Agent Hughes, and Graham on August 25, 2004 based on the Fourth, Fifth, and Sixth Amendments. Boskic also moves to dismiss Count Five of the Indictment based on principles of fundamental fairness entrenched in the Due Process

Clause of the Fifth Amendment.

A. Sixth Amendment Rights

Boskic argues that his Sixth Amendment right to counsel attached when the criminal complaint was filed. On this basis, he contends that since his statements were elicited in the absence of counsel after that time, all of his statements must be suppressed.

The Sixth Amendment provides that "[i]n all criminal **prosecutions,** the **accused** shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI (emphasis supplied). This right "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings-whether by way of **formal charge**, preliminary hearing, indictment, information, or arraignment." Texas v. Cobb, 532 U.S. 162, 167-68 (2001) quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)(emphasis supplied).

The First Circuit has held that the Sixth Amendment right to counsel only attaches "when 'formal charges' have been initiated"-transforming an individual into an "accused" person-or "when 'the government has committed itself to prosecute.' " Roberts v. State of Maine, 48 F.3d 1287, 1290 (1st Cir.1995) quoting Moran v. Burbine,75 U.S. 412, 430-32 (1986); United States v. Gouveia, 467 U.S. 180, 189 (1984); and Kirby v. Illinois, 406 U.S. 682, 688

(1972). It is only then, when "the government's role shifts from investigation to accusation[,] ... that the assistance of one versed in the intricacies of law, is needed to assure that the prosecution's case encounters the crucible of meaningful adversarial testing." Roberts, 48 F.3d at 1290 quoting Moran, 475 U.S. at 430 (1986) (alterations and quotations omitted).

Boskic contends that Agent Nevano's procurement of a criminal complaint against him pursuant to Fed.R.Crim.P. 3 sometime before 3:30 p.m. on August 25, 2004 amounted to the practical equivalent of a formal charge initiating adversary judicial criminal proceedings. The Government responds that Sixth Amendment rights do not attach either at the time of arrest, see Gouveia, 467 U.S. at 190-92, or with the filing of a criminal complaint. See Von Kahl v. United States, 242 F.3d 783, 789 (8th Cir.), cert. denied, 534 U.S. 941 (2001)("The filing of a criminal complaint and the issuance of an arrest warrant do not constitute the initiation of an adverse judicial proceeding for purposes of McNeil."). I agree with the Government.

The Kirby formulation cited in McNeil and Cobb, tellingly omits a complaint from the list of "formal charge, preliminary hearing, indictment, information, or arraignment." Kirby, 406 U.S. at 689 (plurality opinion). Furthermore, several circuits have specifically held that the mere filing of a complaint does not suffice to initiate adversary

judicial criminal proceedings.[8] As the Eighth Circuit has explained:

> [T]he principal function of a complaint under Fed. R. Crim. P. 3 is to serve as the basis for a judicial determination of probable cause for an arrest warrant under Fed. R. Crim. P. 4(a). Complaints under Fed. R. Crim. P. 3 are, therefore, by definition, issued before an arrest occurs. If an arrest does not trigger the Sixth Amendment right to counsel, we are unable to see how the issuance of a complaint that serves as the basis for a probable cause determination authorizing a later arrest would trigger that right. Because warrantless arrests are sometimes authorized, moreover, we note that if we were to hold that the right to counsel does attach when a complaint under Fed. R. Crim. P. 3 issues, we would be granting greater

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[8] See Beck v. Bowersox, 362 F.3d 1095, 1102 n. 4 (8th Cir.2004) citing the following for the proposition that the Sixth Amendment right to counsel does not attach with "an arrest preceded by the filing of a complaint under Rule 3": Von Kahl v. United States, 242 F.3d 783, 789 (8th Cir.), cert. denied, 534 U.S. 941 (2001); United States v. Moore, 122 F.3d 1154, 1156 (8th Cir .1997), cert. denied, 522 U.S. 1135 (1998); United States v. Langley, 848 F.2d 152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir.1987), cert. denied, 486 U.S. 1011 (1988); United States v.. Duvall, 537 F.2d 15, 21-22 (2nd Cir.) (Friendly, J.), cert. denied, 426 U.S. 950 (1976).

> protection to persons arrested with warrants than without, thus discouraging the use of warrants in making arrests for federal crimes. See [United States v.] Duvall, 537 F.2d [15,] 22 [(2nd Cir.) (Friendly, J.), cert. denied, 426 U.S. 950 (1976)]. We therefore hold that the issuance of a complaint under Fed. R. Crim. P. 3 is not the type of 'formal charge' contemplated by Kirby, 406 U.S. at 689 (plurality opinion), and that a person's Sixth Amendment right to counsel does not attach upon the filing of such a complaint.

United States v. Moore, 122 F.3d 1154, 1156 (8th Cir.1997), cert. denied, 522 U.S. 1135 (1998).

The First Circuit has not expressly addressed this issue except to suggest in *dicta* that the filing of the criminal complaint is "[t]he first state action that **could conceivably resemble** a formal charge." Roberts, 48 F.3d at 1290 (emphasis supplied)(where the filing of the complaint did not occur until after the challenged blood/alcohol test, in any event). In the next paragraph of *Roberts*, however, the First Circuit equates formal charge with an "indictment or arraignment" and recognizes that "[o]verall, Supreme Court jurisprudence on the Sixth Amendment appears to allow for few exceptions to the bright-line rule that the right to counsel does not attach until the government initiate : official proceedings by

making a formal charge." Id. at 1291. The Roberts court cited United States v. Heinz, 983 F.2d 609 (5th Cir.1993) for the proposition that Supreme Court jurisprudence calls for a "strictly formal test for determining the initiation of judicial proceedings as opposed to a more functional test." Roberts, 48 F.3d at 1290 citing Heinz, 983 F.2d at 612-13. I find nothing in Roberts, despite its passing reference to "conceivable resemblance" of a complaint to a formal charge, to suggest I should not follow the fully developed opinions of the Second, Eighth, Ninth, and Eleventh Circuits.

Given this determination, I conclude that Boskic's Sixth Amendment right had not yet attached when he spoke with Agent Carroll, Agent Hughes, and Graham on August 25, 2004, even though Agent Nevano procured an arrest warrant and filed a criminal complaint against Boskic before the interview. In any event, it is only "once this right to counsel has attached and has been **invoked**" that "any subsequent waiver during a police-initiated **custodial interview** is ineffective." McNeil, 501 U.S. at 175 citing Michigan v. Jackson, 475 U.S. 625 (1986)(emphasis supplied). I note that despite the Miranda warning, Boskic never invoked the right to counsel.

B. Delay In Executing Warrant

Boskic argues that the delay in executing the arrest warrant procured before the interview was unreasonable in violation of the Fourth Amendment

and amounted to a circumvention of the obligation under Fed. R. Crim. P. 5(a)(1)(A), which requires "[a] person making an arrest within the United States ... [to] take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise."

It is settled that "[t]here is no requirement that an arrest warrant be executed immediately after its issuance; rather, the general rule is that, while execution should not be unreasonably delayed, law enforcement officers have a reasonable time in which to execute a warrant and need not arrest at the first opportunity." United States v. Drake, 655 F.2d 1025, 1027 (10th Cir.1981). Accord United States v. Berkowitz, 429 F.2d 921, 926 (1st Cir.1970) ("We are unaware of any right of a defendant to be arrested at a particular time.");United States v. Joines, 258 F.2d 471, 472-73 (3rd Cir.1958) ("[O]rdinarily there is no legal requirement that a warrant of arrest must be executed immediately or at the first opportunity. While its execution should not be unreasonably delayed there may be perfectly valid reasons why further investigation should be made before the drastic step is taken of arresting a citizen on a criminal charge. Certainly there is no constitutional right to be arrested promptly or otherwise.")(internal citations omitted); United States v. Toro, 840 F.2d 1221, 1233 (5th Cir.1988) ("[L] aw enforcement officials are under no constitutional duty to terminate a criminal investigation the moment they have an arrest warrant in their hands.").

The rationale behind this settled understanding is simple: "evidence sufficient to sustain issuance of an arrest warrant, i.e., probable cause, may not be sufficient to sustain a conviction." Toro, 840 F.2d at 1233-34 citing United States v. Cravero, 545 F.2d 406, 413 (5th Cir.1976), cert. denied sub nom, Miller v. United States, 429 U.S. 1100 (1977). Consequently, "[t]he police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long," and they "are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." Hoffa v. United States, 385 U.S. 293, 310 (1966).

There is no question here that the agents executed the warrant within a *per se* reasonable time (within 12 hours). Compare Toro, 840 F.2d at 1234 (finding a "three-week delay between issuance and arrest is not *per se* unreasonable"). Nevertheless, Boskic points to language in the Tenth Circuit's *Drake* opinion suggesting that an otherwise reasonable delay in executing an arrest warrant may justify suppression if the government acted improperly in delaying the arrest.

Drake held that "[d]elay has been held fatal,

however, when government agents have purposely delayed execution to gain a tactical advantage not otherwise attainable for example, to search 'incident to arrest' premises for which a warrant was unobtainable." 655 F.2d at 1027 citing McKnight v. United States, 183 F.2d 977 (D.C.Cir.1950).[9] The Fifth Circuit made a similar comment in *dicta* in *Toro*, suggesting that a search may be unreasonable if "the government acted unreasonably during the period or [if] its reasons for delaying execution were improper." 840 F.2d at 1234.

In McKnight, the case that provided the basis for the Tenth Circuit's comment in Drake, the D.C. Circuit suppressed evidence obtained incident to an arrest of a defendant in his home because the police had rejected a convenient opportunity to arrest him in a public street. The court reasoned, "[n]either policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it. Since McKnight's arrest was accomplished by a needless and violent invasion of a private house, it was illegal, particularly since the real purpose of the invasion

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[9] On the facts in Drake, the Tenth Circuit concluded that the arrest was not purposely delayed to gain a tactical advantage not otherwise attainable. "The agents apparently delayed service in order to strengthen their case and to obtain peaceful possession of the birds. The legal question is whether such a delay is, in and of itself, impermissible. We hold it is not when the evidence thus obtained could have been lawfully secured without the arrest warrant." United States v. Drake, 655 F.2d 1025, 1027 (10th Cir.1981).

was not an arrest but a search." McKnight, 183 F.2d at 978.

I decline to extend the broad principle cautioning against use of a Complaint to occasion a contrived search incident to arrest to cases where government officials delay execution in order to carry out a non-custodial interrogation. The Supreme Court rejected a somewhat similar contention in Hoffa. There, the petitioner argued that his statements, made after the point in time when the government had probable cause to arrest him for attempting to bribe members of the jury, were acquired "only by flouting the petitioner's Sixth Amendment right to counsel." Hoffa, 385 U.S. at 310. He reasoned that if the government agents had arrested him when they had cause, they "could not have continued to question the petitioner without observance of his Sixth Amendment right to counsel." Id. at 309. The Supreme Court rejected this argument holding:

> Nothing in Massiah, in Escobedo, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too

> soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Id. at 310 (footnote omitted).

To the degree that there may nonetheless be "improper" reasons for delaying execution that might create a Fourth Amendment issue, as suggested in Toro, McKnight, and Drake, I find that the resulting issues in this case would overlap with Boskic's argument that the Government's tactics were fundamentally unfair. I will consider this argument below when addressing Boskic's due process and self-incrimination claims. As for Rule 5(c), I find that the Rule does not require government agents to execute arrest warrants at the first available opportunity. Rather the provision requires, as the plain language suggests, arresting agents to have any arrested person arraigned without unnecessary delay after effecting the arrest. See Mallory v. United States, 354 U.S. 449, 451-56 (1957).

C. Voluntariness

Boskic argues that the statements he made

before 8:20 p.m. were obtained in violation of the Fifth Amendment since they were induced (coerced) by the misrepresentations of Agents Carroll and Hughes as to the purpose of the interview. He also claims that any incriminating statements made after 8:20 p.m. must be suppressed because the taint of involuntariness of the initial confession was not dissipated when he learned that he would be arrested. For purposes of clarity in the course of my discussion in Section II.C.3, *infra,* of the totality of the circumstances, I will consider the statements Boskic made to Agents Carroll and Hughes before Graham entered the room separately from admissions after Graham entered the room until about 8:20 p.m. and from his admissions and confession after 8:20 p.m.

The Fifth Amendment provides that "[n]o person shall ... be **compelled** in any criminal case to be a witness against himself." U.S. Const. Amend. VI (emphasis supplied). Since Chief Justice Marshall first considered the scope of the Fifth Amendment right against compulsory self-incrimination, "all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion." Hoffa, 385 U.S. at 304.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court concluded "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to

compel him to speak where he would not otherwise do so freely." Id. at 467. It is only "to combat these [inherently compelling] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, [that] the accused must be adequately and effectively apprised of his [Miranda] rights and the exercise of those rights must be fully honored." Id. Since Miranda, the Supreme Court has "specifically stressed that it was the Custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements of its Miranda holding." Beckwith v. United States, 425 U.S. 341, 346 (1976). See, e.g., Colorado v. Connelly, 479 U.S. 157, 170 (1986)("The sole concern of the Fifth Amendment, on which Miranda, was based, is governmental coercion."). Consequently, a non-custodial interview of a person, even someone that is the subject or "focus" of an investigation, "does not present the elements which the Miranda Court found so inherently coercive as to require its holding." Beckwith, 425 U.S. at 347 (finding that statements made by a taxpayer to Internal Revenue agents in an interview conducted in a private home, which the agents had been invited into, were admissible against the taxpayer in the ensuing criminal tax fraud prosecution, even though the taxpayer was the focus of a criminal tax investigation and he had not been given Miranda warnings prior to the interview).

Boskic concedes that he was not "in custody" until approximately 8:20 p.m. when Agent Carroll told him that he would be arrested and held overnight. Throughout the afternoon and early

evening until then the door to the interview room remained open and Boskic believed he was being questioned in connection with his request for travel documents until Graham introduced himself as an investigator from the ICTY. Nevertheless, "noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of ... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' " Id. at 347-48 quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961). See also Unites States v. Burns, 15 F.3d 211, 214 (1st Cir.1994). However, "only confessions procured by *coercive official tactics* should be excluded as involuntary." United States v. Genao, 281 F.3d 305, 310 (1st Cir.2002) quoting United States v. Byram, 145 F.3d 405, 407 (1st Cir.1998). To find that officials used coercive tactics, the facts must "add up to 'police overreaching.' " Genao, 281 F.3d at 310 quoting Connelly, 479 U.S. at 170. When such a claim is raised, the court must " 'examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " Beckwith, 425 U.S. at 348 quoting Davis v. North Carolina, 384 U.S. 737, 741-42 (1966). A voluntary confession is one that is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." Moran, 475 U.S. at 421.

The burden is on the government to prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). The

voluntariness of an admission depends on " 'whether the will of the defendant was overborne [by coercive police activity] so that the statement was not his free and voluntary act, and that question is to be resolved in light of the totality of the circumstances,' " Bryant v. Vose, 785 F.2d 364, 367-68 (1st Cir .1986) quoting Procunier v. Atchley, 400 U.S. 446, 453 (1971)(alteration added), *"including* any promises or threats made by police officers or the prosecution." United States v. Jackson, 918 F.2d 236, 242 (1st Cir.1990). See also 18 U.S.C. § 3501(b)("The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession.").

The circumstances to be considered include:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such

> defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. § 3501(b). The Supreme Court has listed other potential circumstances that are relevant to the voluntariness of the confession. See Withrow v. Williams, 507 U.S. 680, 693-94 (1993). They "include not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health. They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." Id. (citations omitted). Other courts have considered the suspect's demeanor, see, e.g., United States v. Kruger, 151 F.Supp.2d 86, 107 (D.Me.2001)("Kruger's demeanor did not indicate that he felt coerced in any way"), cf. United States v. Tingle, 658 F.2d 1332, 1334 (9th Cir.1981)(noting that the defendant was sobbing and shaking throughout the interrogation); the atmosphere of the interview, see, e.g., Byram, 145 F.3d at 408 (where the atmosphere "appears to have been benign"); the suspect's familiarity with the criminal justice system, see, e.g., United States v. White, 847 F.Supp. 219, 224 (D.Mass.1994)(where the defendant "was an assistant clerk magistrate and a bail bondsman who was familiar with the criminal justice system") and Lynumn v. Illinois, 372 U.S. 528, 534 (1963)(where the defendant had "no previous experience with the criminal law, and had no reason not to believe that

the police had ample power to carry out their threats"); and whether the suspect or the government agents initiated the contact, see, e.g., White, 847 F.Supp. at 224 ("[A]though the FBI deceived White to get him to the FBI office and attempted to use psychologically coercive techniques to obtain his cooperation in the" first encounter, "White was the one who [subsequently] initiated contact with the FBI ..., and it was during that meeting that he confessed and agreed to cooperate.").

Recognizing that the record reveals "no 'physical or psychological pressures' that could 'overr[i]de the defendant's will,' " United States v. Lawrence, 889 F.2d 1187, 1189 (1st Cir.1989) quoting New Jersey v. Portash, 440 U.S. 450, 459 (1979), Boskic's involuntariness claim rests on the contention that the government agents used the intrinsically coercive nature of an immigration interview and misled him into believing he was not the subject of a criminal investigation.

1. Coercive Nature of an Immigration Interview

Although Boskic conceded that the interview was not formally custodial before 8:20 p.m., I find that the quasi-coercive nature of an official immigration interview in a federal building, whether the door is open or not, to be a factor to be considered in deciding whether a confession was given voluntarily.

Miranda reasoned that custodial interrogation

is inherently coercive because "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." Illinois v. Perkins, 496 U.S. 292, 297 (1990). Here, Boskic answered all of Agent Carroll's questions because, as he explained, "Mr. Carroll ... works in the immigration status and he's in charge of me and I thought that I had to answer his questions." Thus, although Boskic did not initially understand the nature of his interview, it would be naive to ignore the perception-indeed fear-of all non-citizens in the United States that immigration authorities control their fate. As Boskic points out, immigration officers have the "power without warrant ... to interrogate any alien ... as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). They also have the "power without warrant ... to arrest any alien in the United States, [upon] reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). Consequently, unlike in *Perkins,* for instance, where the suspect did not know that he was speaking to a government agent, there is a real possibility that a non-citizen might feel coerced into speaking with immigration authorities. Perkins, 496 U.S. at 297 (distinguishing Mathis v. United States, 391 U.S. 1 (1968), which held that an inmate's statements to a known Government official who was investigating the possibility of noncompliance with the tax laws were inadmissible because no *Miranda* warnings were

given). Nevertheless, the potentially coercive nature of an official immigration interview in a federal building is insufficient in and of itself to render a confession involuntary. And that is particularly so here where Boskic himself pressed on with the interview even after Agent Carroll told him the travel documents he sought were not necessary.

2. Deception Generally

Boskic's deception argument rests on the contention that his confession was involuntary because in misrepresenting the existence of a criminal investigation, the Agents deprived him of the ability to make rational choice.

To the degree that Boskic is suggesting that misleading him as to the nature of the investigation deprived him of information essential to his ability to knowingly exercise his privilege against self-incrimination, I must distinguish the concepts of voluntariness and knowingly/intelligently. While a waiver of Miranda rights in custodial interrogations must be made both "voluntarily" and "knowingly and intelligently," Moran, 475 U.S. at 421 quoting Miranda, 384 U.S. at 444, the latter concept of a requisite level of comprehension to knowingly relinquish a constitutional right is not part of the voluntariness analysis in non-custodial interrogations. A voluntary confession is simply one that is "the product of a free and deliberate choice rather than intimidation, coercion, or deception."

Moran, 475 U.S. at 421. Consequently, the circumstances of this case are different from those in United States v. Rogers, 906 F.2d 189 (5th Cir.1990), where the Fifth Circuit concluded that "Rogers' **waiver** of his Fifth Amendment rights was not made with a full awareness of the consequences of the decision to abandon his rights or with the requisite level of comprehension" because "the interview was conducted under the auspices of the Lee County Sheriff's Department, whose representatives had assured Rogers that he would not be prosecuted for his purchase of the stolen guns." *Id.* at 192 (emphasis supplied). In any event, even in a custodial setting, "the Constitution [does not] require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Moran*, 475 U.S. at 422.

To the degree Boskic's argument is attempting to resurrect the older phraseology that for a confession to be voluntary it must be "the product of a rational intellect and a free will," Townsend v. Sain, 372 U.S. 293, 307 (1963) quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960), it is imperative to recognize that although "at common law, confessions produced by promises not to prosecute or offers of leniency were often excluded as involuntary[,] ... in recent years, the Supreme Court has confined the voluntariness concept by holding that only confessions procured by coercive official tactics should be excluded as involuntary." Byram, 145 F.3d at 407; see also United States v. Flemmi,

225 F.3d 78, 91 (1st Cir.2000). " 'Free choice' [distinct from state coercion] is no longer a touchstone; indeed, the Supreme Court has ruled in *Connelly* that a volunteered confession was admissible even if the product of a psychosis that undermined the suspect's ability to make a free and rational choice." Byram, 145 F.3d at 407-08. Consequently, the privilege against self-incrimination "forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner.... Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within [the] ... concerns" of the privilege against self-incrimination. Perkins, 496 U.S. at 296, 297, 300 (holding that "an undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response" because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate").

The First Circuit has recognized that "some types of police trickery can entail coercion: consider a confession obtained because the police falsely threatened to take a suspect's child away from her if she did not cooperate." Byram, 145 F.3d at 408 citing Lynumn, 372 U.S. at 534 (the defendant only confessed after the police had told her that state financial aid for her infant children would be cut off,

and her children taken from her, if she did not cooperate). "But trickery is not automatically coercion." Byram, 145 F.3d at 408. While, "trickery can sink to the level of coercion, ... this is a relatively rare phenomenon." Flemmi, 225 F.3d at 91 n. 5. "Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceits have been held voluntary in a number of situations." Byram, 145 F.3d at 408. See, e.g., Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that the fact that the police misrepresented the statements that the co-conspirator had made "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); Byram, 145 F.3d at 408 (holding that falsely assuring a suspect that he was not in danger of prosecution does not amount to coercion); Holland v. McGinnis, 963 F.2d 1044, 1051-52 (7th Cir.1992), cert. denied, 506 U.S. 1082 (1993)(holding that falsely misrepresenting the strength of the evidence does not amount to coercion). But see Spano v. New York, 360 U.S. 315, 323 (1959)(concluding that the "petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused," where the officer, a childhood friend of the petitioner, falsely told the petitioner that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child, if the petitioner did not confess).

The relevant question is whether the deliberate ruse planned and carried out by AUSA West, Agent Carroll, Agent Hughes, and Graham "sink[s] to the level of coercion," given the totality of the circumstances. Flemmi, 225 F.3d at 91 n. 5. The First Circuit provided some direction as to what kind of deception would cross the line in Byram. Its citation to the Seventh Circuit's decision in Holland suggests the value of the following more extensive guidance:

> Of the numerous varieties of police trickery ... a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because "it can almost always be said that the interrogation caused the confession." Thus, the issue is not causation, but the degree of improper coercion, and in this instance the degree was slight. Inflating evidence of Holland's guilt interfered little, if at all, with his 'free and deliberate choice' of whether to confess, for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and

wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. In other words, the deception did not interject the type of extrinsic considerations that would overcome Holland's will by distorting an otherwise rational choice of whether to confess or remain silent.

By way of contrast, consider the brand of police trickery the Supreme Court considered inherently coercive in Lynumn v. Illinois. In that case, the police told a female suspect that she was in jeopardy of losing welfare benefits and custody of her children, but offered to recommend leniency if she would confess. Unlike the tactic employed during Holland's interrogation, this particular deceptive practice did more than affect the suspect's beliefs regarding her actual guilt or innocence, and judgments regarding the evidence connecting her to the crime. It also distorted the suspect's rational choice (i.e., is it wise or morally right to confess given the aforementioned beliefs and judgments?) by introducing a completely extrinsic consideration: an empty but plausible threat to take away something to which she and her children would otherwise be

> entitled. This extrinsic consideration not only impaired free choice, but also cast doubt upon the reliability of the resulting confession, for one can easily imagine that a concerned parent, even if actually innocent, would confess and risk prison to avoid losing custody of her children and their welfare benefits.

Holland, 963 F.2d at 1051-52 (internal citations omitted; emphasis supplied).

I find here none of the extrinsic circumstances the case law has identified as necessary to ground a claim that government deception constitutes coercion.

3. Totality of the Circumstances

(a) Before the Graham interview – It is clear that the Agents intended to deceive Boskic into believing at first that the interview was only about his travel request so that they could get him talking. Compare Flemmi, 225 F.3d at 91 n. 5 ("Here, there is no evidence that Morris or Connolly intended to mislead Flemmi or tried to dupe him."). To carry out the first part of the plan, the Agents pulled Boskic's unprompted travel application out of the normal processing queue and sent him a misleading notice for an interview about the request, hoping to use the quasi-coercive nature of an official immigration interview to get him talking. On the day of the August 25th interview, Agent Carroll introduced

himself simply as Tom Carroll, and did not specify that he was an ICE investigator, as opposed to an adjudicator of applications in normal course. He also led Boskic to believe that the purpose of the interview was to adjudicate his travel application. The Agents deliberately chose not to use the interpreter or the video camera in the interview room to avoid raising any suspicion. And Agent Carroll misrepresented that whenever questions about a criminal record are raised, the FBI must be brought in as pretext to transition Agent Hughes into the room without raising too much suspicion.

Nevertheless, until Graham entered the room, there is no question that Boskic's statements were voluntary. Although the agents initiated the interview, Boskic chose to remain even after Agent Carroll explained that he did not need a travel document. Boskic's demeanor was relaxed and the atmosphere was conversational. He was given an oath and signed an INS form providing the standard Miranda warning, yet he chose to repeat his claim that he had no additional prior military experience and his denial of a prior criminal record outside the United States in the hope that he could secure the travel document he believed that he needed. Under these circumstances, it is plain that Agents Carroll and Hughes did not coerce Boskic into denying his additional prior military experience.

I will, however, return to Boskic's objection to the admissibility of his statements during the pre-Graham portion of the interview in my analysis of

the perjury trap doctrine discussed *infra* in Section II.E.

(b) The Graham interview and until 8:20 p.m. – Boskic's statements after Graham entered the scene until about 8:20 p.m., when he learned he would be arrested, present a more difficult set of issues because when Graham told Boskic he was not the subject of his investigation, Agents Carroll and Hughes did not clarify that their investigation was different from Graham's investigation and that Boskic was in fact the target of their separate investigation. Instead, Agents Carroll and Hughes purposefully allowed Boskic to think that he was not the subject of investigation. They did this through their silence and by the way the three officials carried out the remainder of the interview in a coordinated fashion. In doing so, the actions of Agents Carroll and Hughes suggested that the three officials were all working together in furtherance of Graham's goal of prosecuting Boskic's senior officers for their roles in the Srebrenica massacres and that Graham's assurance applied equally to American authorities.

The Third Circuit disapproved of such Government misrepresentation in United States v. Swint, 15 F.3d 286 (3rd Cir.1994), where the fact that "neither the state nor federal agents clearly informed Swint or his attorney that Swint's statements to the DEA agents would not be off-the-record," as had been suggested to the defendant, was one of the factors relied upon in concluding that the

defendant's statements were involuntary. Id. at 290. The First Circuit, however, appears to have taken a less rigorous approach than the Third Circuit to police trickery through false assurances. In *Byram*, the court found that "[a]t first, Byram was reluctant to talk, but he spoke readily after [the officer] told him that he was not 'implicated in any of this.'" 145 F.3d at 406. This assurance was "literally true so far as the murder charge was concerned but a *suggestio falsi* as pertains to a possible possession charge." Id. at 408. Nevertheless, the court held that "[g]iven the narrowed definition of coercion in Connelly, it would be very had to treat as *coercion* a false assurance to a suspect that he was not in danger of prosecution." But see Flemmi, 225 F.3d at 92 (where the First Circuit distinguished Flemmi from Swint because there was "no evidence of consciously misleading conduct on the part of the FBI agents" in Flemmi as there was in Swint).

Here, as in Byram, Agents Carroll and Hughes were careful not to make any literally false statements after Graham entered the room.[10] Nevertheless, their actions and silence were intended to create a false assurance that Boskic was not the subject of any domestic investigation. But given the holding in Byram, I find that such a false assurance

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[10] Although Agent Carroll initially misrepresented that the purpose of the interview was to "go over" Boskic's re-entry permit application and that the FBI has to be brought in when criminal records come up, Boskic certainly understood that these representations were false by the time Graham entered the room.

cannot be considered to have coerced Boskic into confessing. While the implicit false assurance may have "caused" him to confess, it did not introduce "a completely extrinsic consideration" that coerced him into confessing. Holland, 963 F.2d at 1052.

While the Government's deception is " 'insufficient [by itself] to make [an] otherwise voluntary confession inadmissible,' [it] is one factor to consider among the totality of circumstances in determining voluntariness." Holland, 963 F.2d at 1051 quoting Frazier, 394 U.S. at 739. Nevertheless, my review of the totality of the circumstances on August 25, 2004 convinces me that Boskic's statements during this period were voluntary.

Supporting a finding of involuntariness, is the fact that Boskic did not know that the "nature of the offense with ... which he was suspected at the time of making the confession," nor even that he was a suspect. 18 U.S.C. § 3501(b)(2). He was also without counsel during the interview. 18 U.S.C. § 3501(b)(5).

In contrast to his demeanor before Graham entered the room, Boskic became "unnerved" and "unsettled" after Graham began his interview. When Agent Hughes asked him to put his statement in writing he became "nervous" and "hesitant."[11] There is also the fact that it took Agents Hughes and

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[11] Boskic's demeanor was, however, not as indicative of coercion as in Tingle, 658 F.2d at 1334, where the defendant was sobbing and shaking throughout the interrogation.

Carroll 10 or 15 minutes of explaining the "benefit" of him putting his story in his own words rather than relying on their version of his story, to convince Boskic to write out his statement. Finally, there is, of course, the deception by Agents Hughes and Carroll leading Boskic to believe the interview had been set-up so that he would provide information to help the ICTY prosecute senior officials.

Supporting a finding of voluntariness, however, is the important fact that Boskic signed a Miranda form at the outset of the interview. Agent Carroll also reminded him of those rights when he brought both Agent Hughes and Graham into the room. 18 U.S.C. § 3501(b)(3), (4). At the beginning of the written statement, Boskic also wrote out in his own hand, following Agent Hughes's dictation, that he understood and was giving up his rights and that he was giving the "statement voluntarily, without promises and guarantees." Boskic, who had had prior encounters with law enforcement in the United States, was also familiar with his constitutional rights. The interview was not lengthy and Boskic was given breaks and offered food and drink. Boskic was of a mature age (40 years old on August 25, 2004) and while English is not his native language, he was assisted by a translator during this part of the interview. Finally, despite the implicit false assurances by Agents Carroll and Hughes that Boskic was not the subject of any investigation, Boskic appears to have been aware that a man implicated in a genocide would not escape all consequences for his crimes against humanity.

According to Graham, Boskic said that "if he was to go down for what happened, other would go down as well." Together, these facts outweigh those suggesting Boskic was coerced.

(c) Statements after 8:20 p.m. – Boskic was about halfway finished with his written statement when he was told around 8:20 p.m. that he would be arrested. He argues that any incriminating statements made after 8:20 p.m. must be suppressed because the taint of involuntariness of the initial confession was not dissipated when he learned that he would be arrested. Since I have found that his statements up until 8:20 p.m. were voluntary, I will not suppress the later statements.

Boskic was aware of his rights when he was told he would be arrested. He had signed both sides (English and Serbo-Croatian) of the Warning as to Rights form at the outset of the interview five hours earlier and Agent Carroll reminded him of those rights when Agent Hughes and Graham were each brought into the room. Although Agent Carroll only did so in English, I find that Boskic's English was proficient enough to understand, at the very least, that Agent Carroll was referring to the rights written out in Serbo-Croatian on the Warning as to Rights form Boskic had signed. At the beginning of the written statement, Boskic also wrote out in his own hand following Agent Hughes's dictation that he understood and was giving up his rights and that he was giving the "statement voluntarily, without promises and guarantees." Furthermore, when he

was told that he would be arrested, Boskic paused for a few minutes, plainly contemplating what he should do. He chose to continue writing his statement because, as he testified, he had already "said everything ." Consequently, I find that Boskic "voluntarily, knowingly and intelligently," Miranda, 384 U.S. at 444, waived his Miranda rights when he chose to finish his written statement.

(d) Fruits of the search – Finally, Boskic also seeks to suppress the fruits of any searches of his apartment and car. He claims that his consent was not voluntary and thus the search violated his Fourth Amendment Rights.

As Boskic points out, the principles for determining the voluntariness of consent for a search are the same as those for determining the voluntariness of a confession-i.e. "whether consent is voluntary turns on questions of fact, determinable from the totality of the circumstances." United States v. Romain, 393 F.3d 63, 69 (1st Cir.2004) citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). Consequently, for the same reason that Boskic's statements were voluntary, I find his consent to search was also voluntarily given.

D. Fundamental Fairness

In support both of his motion to suppress and of his motion to dismiss Count Five, Boskic also argues that the government violated his Fifth Amendment due process rights because the

investigators' surreptitious conduct transgressed fundamental principles of fairness. The Supreme Court contemplated this additional avenue of constitutional protection in United States v. Kordel, 397 U.S. 1, 11-13 (1970).

As with the voluntariness issue, I will consider separately Boskic's conceptually distinct grievances: he complains (i) that he was tricked into providing the government with additional statements that can be used as evidence against him in the prosecution of the several perjury counts and (ii) that he was unfairly tricked into perjuring himself for an alleged fifth time. I address the question of admissibility in this section and address the perjury trap doctrine in the next section.

In Kordel, the Supreme Court suggested that "even if the Government's conduct did not violate [the defendant's] Fifth Amendment privilege against compulsory self-incrimination, it [may] nonetheless reflect[ ] such unfairness and want of consideration for justice as independently to require the reversal of [the defendant's] convictions." 397 U.S. at 11. On the record in Kordel, however, the Court concluded that "the respondents have made out [n]either a violation of due process [n]or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power." Id. But the Court took pains to distinguish the facts in Kordel from cases where:

> the Government has brought a civil

> action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; [ ]or ... where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; [ ]or ... [where there are] any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 11-12 (footnotes omitted). The Supreme Court later reaffirmed the possibility that inculpatory statements procured by police misconduct may necessitate suppression, but only where "the challenged conduct [is] ... of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." Moran, 475 U.S. at 433-34. In Moran, however, the Court found that the "impropriety" of conveying false information to an attorney is not the kind of behavior that "should be condemned as violative of canons fundamental to the 'traditions and conscience of our people.' " Id. at 432 quoting Rochin v. California, 342 U.S. 165, 169(1952)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

More recently, the First Circuit also contemplated the possibility that "regardless of

coercion, the methods used to obtain [a suspect's] statements [might be] so shocking to the conscience that they violated [the suspect's] rights to 'substantive due process.' " Byram, 145 F.3d at 408. As support for this proposition, the court cited the "classic case" of Rochin, "where retrieving evidence by pumping the suspect's stomach was regarded as so at odds with civilized values that the evidence had to be excluded." Byram, 145 F.3d at 408. On the facts in Byram, however, the First Circuit refused to suppress the statements at issue, concluding that "[g]iven the district court's finding of good faith, the police conduct cannot be described as shocking to the conscience or beyond the bounds of civilized behavior." Id.

Relying upon the possibility left open in Kordel, Moran, and Byram, Boskic contends that the Government's pretextual use of an immigration interview to obtain statements from him when he was without counsel for use in a pending criminal case of which he was not apprized was conduct fundamentally unfair and a violation of due process.

Boskic analogizes the circumstances here with the facts underlying the dismissals of the indictments in United States v. Stringer, 408 F.Supp.2d 1083 (D.Or.2006)[12] and United States v.

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[12] In United States v. Stringer, the "deceit and trickery [of SEC personnel] to keep the criminal investigation concealed ... went so far as to instruct court reporters to refrain from mentioning the U.S. Attorney's involvement and to have [the Assistant United States Attorney] avoid being near certain interviews for

Rand, 308 F.Supp. 1231 (N.D.Ohio 1970).[13] Despite these decisions, I conclude that the Government's misrepresentation as to the existence of a separate federal investigation of Boskic was not so outrageous as to violate "that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." United

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fear his presence would cause the criminal investigation to surface. Moreover, [the SEC attorney] misled [the defendant] and his attorney into believing he was not a target and evaded the question about the USAO's involvement." 408 F.Supp.2d 1083, 1089 (D.Or.2006). The Court found that dismissal of the indictment against the defendants was warranted because this governmental misconduct was " 'so grossly shocking and so outrageous as to violate the universal sense of justice.' " Id. quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir.1991).

[13] In United States v. Rand, the FDA began civil proceedings to determine whether the defendant business should be enjoined from transporting its cancer vaccine in interstate commerce. Despite the individual defendant's willingness to cooperate, the government went ahead with a civil trial and questioned the defendant on completely irrelevant matters. The SEC participated to some extent in the civil proceedings and the defendant was granted immunity. When the government later tried to prosecute Rand for SEC violations, arguing that the scope of the immunity could not have included SEC violations because it was unaware of them until the end of the trial, the court dismissed the indictment because the government had "engaged in an obnoxious form of using parallel proceedings" by eliciting incriminating statements in civil proceedings "from a defendant who had been lulled into believing he was immunized from prosecution" where the Government knew but did not inform the defendant that criminal proceedings were pending. United States v. Rand, 308 F.Supp. 1231, 1234 (N.D.Ohio 1970)

States v. Santana, 6 F.3d 1, 4 (1st Cir.1993).

In Stringer, for example, the district court suggested that "[a] government agency may not develop a criminal investigation under the auspices of a civil investigation. It would be a 'flagrant disregard of individuals' rights' to 'deliberately deceive, or even lull' someone into incriminating themselves in the civil context when 'activities of an obvious criminal nature are under investigation.' " 408 F.Supp.2d at 1089 quoting United States v. Grunewald, 987 F.2d 531, 534 (8th Cir.1993). See also United States v. Tweel, 550 F.2d 297 (5th Cir.1977). However, the First Circuit has observed that suppression is only available where the government made "fairly serious *affirmative* misrepresentations. No case holds that an IRS agent breaches a constitutional duty when he obtains information merely by failing to state specifically that he is conducting a criminal investigation." United States v. Irvine, 699 F.2d 43, 46 (1st Cir.1983)(emphasis in original). Even if the term "fairly serious affirmative misrepresentations" is given an expansive definition, the Government did not abuse a civil investigation or abuse civil process in this case. The cases cited by Boskic in support of his due process theory involve questionable government conduct where "parallel proceedings" initiated by the government were in play and the subject defendant was unaware of the pending criminal investigation when cooperating and providing incriminating information to the civil investigators. The agents here simply summoned

Boskic for a staged interview in response to his own optional application for a travel permit. Boskic chose to remain even after Agent Carroll explained that he did not need a travel document. The agents were under no affirmative duty to provide more background information to someone like Boskic who himself put in motion the conditions for the encounter by pressing his application. Cf. United States v. Robson, 477 F.2d 13, 18 (9th Cir.1973) quoting United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir.1970) ("'Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.'"). Boskic did not ask what would happen to him until about 8:20 p.m., at which point the agents told him the truth-he would be arrested.

More fundamentally, I conclude that the Government did not use tactics that were "truly outrageous, uncivilized, and intolerable." Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir .1999). "[A]n abuse of power practiced by the executive branch of state government sinks to a level cognizable under the Due Process Clause only when it is so extreme and egregious as to shock the contemporary conscience." DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir.2005) citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). "Even violations of the law resulting from bad faith do not necessarily amount to unconstitutional deprivations of substantive due process; conduct that is 'more egregious and more extreme' is required." McConkie v. Nichols, No. 05-

2727, slip op. at 4, (1st Cir. May 15, 2006) quoting DePoutot, 424 F.3d at 119. Consequently, "even where an officer questions a suspect in an unlawful manner, this does not necessarily mean that the questioning entitles the plaintiff to damages under section 1983" for violating substantive due process. McConkie, slip op. at 6.

Based on this standard, the First Circuit in McConkie affirmed summary judgment granted to a police detective sued under 42 U.S.C. §§ 1983 and 1988 for an alleged affirmative false assurance arguably comparable to-although, I find, even more egregious and extreme than-the behavior of Agents Carroll and Hughes at issue here. The plaintiff in McConkie claimed that in a non-custodial interview concerning possible sexual abuse of a child, the police detective defendant told him that "this stuff stays confidential, especially because a juvenile is involved." Slip op. at 5. Based on that statement, the plaintiff alleged that the detective intentionally deceived him about his Fifth Amendment right in violation of his substantive due process rights. Id. at 3. The First Circuit held that although the detective's conduct was not something to be condoned, "[e]ven construing [his] statements as lies, lies alone are not necessarily considered conscience-shocking." Id. at p. 6 citing Cruz-Erazo v. Rivera-Montanez, 212 F.3d 617, 623 (1st Cir.2000)(holding that it was not conscience-shocking for police officers to deliberately lie in official documents and perjure themselves in official court proceedings) and Byram,145 F.3d at 408-09. The Court specifically distinguished the

detective's statement in McConkie from the shocking behavior of the law enforcement officers in Limone v. Condon, 372 F.3d 39 (1st Cir.2004), who, in order to protect the true perpetrators, deliberately fabricated evidence and framed individuals for crimes they did not commit. In Limone the government conduct clearly violated the substantive due process rights of those wrongfully convicted. The conduct here, however, is more akin to the false assurance given by the detective in the non-custodial interview in McConkie.

In sum, while the Government's conduct was certainly pretextual, especially since Agents Carroll and Hughes had procured an arrest warrant against Boskic prior to the interview, it was not fundamentally unfair. "[T]he Supreme Court's tolerance of police guile in Frazier makes clear that the police can often mislead suspects, at least where coercion is not involved; thus, it is impossible to treat all such false statements as improper, let alone outrageous or uncivilized." Byram, 145 F.3d at 408. Consequently, "facts more egregious than those presented" here, "would be required to 'rise to a level of a due process violation.' " Id. quoting Moran, 475 U.S. at 432, and to justify suppression of the resulting statements.

E. Perjury Trap

Finally, Boskic contends that his statements prior to when Graham entered the room should be suppressed-and the fifth perjury count should be

dismissed because they were elicited pursuant to a perjury trap in violation of the basic principles of fundamental fairness entrenched in the Due Process Clause of the Fifth Amendment.

The government contends that even an alleged constitutional violation is not a defense to perjury or false statements, citing a long list of cases including United States v. Mandujano, 425 U.S. 564 (1976), United States v. Wong, 431 U.S. 174, and United States v. Babb, 807 F.2d 272 (1st Cir.1972). However, as Boskic points out, the Supreme Court and the First Circuit appear to have left open the possibility that perjurious statements may be suppressed and/or perjury indictments may be dismissed where there is egregious prosecutorial or government misconduct, despite the accepted rule that the Fifth Amendment privilege against self-incrimination does not shelter perjury. See Babb, 807 F.2d at 277 (distinguishing the defendant's Fifth Amendment self-incrimination and fundamental fairness claims and concluding under the latter heading that "perjured testimony before a grand jury will be suppressed because of prosecutorial misconduct only if the misconduct undermines the validity of the grand jury process itself"). See also Mandugano, 425 U.S. at 570 quoting United States v. Orta, 253 F.2d 312, 314 (1958) (" 'The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness.' "). Given the language in the case law, I will not categorically foreclose the possibility of suppressing evidence or dismissing a

perjury charge as a result of the government's allegedly fundamentally unfair conduct.

Turning to the merits of Boskic's more specific constitutional claim, however, I find little support for the proposition that a perjury trap can justify suppression of perjurious statements or dismissal of a perjury count. See, e.g., Wong, 431 U.S. at 179 ("[A]ccepting, arguendo, respondent's argument as to the dilemma posed in the grand jury procedures here, perjury is nevertheless not a permissible alternative."). Boskic was not compelled either to attend or to continue the interview. He had the choice to leave without the travel permit, whose pursuit was his own choice.

The purpose of the interview was not to catch Boskic in another lie; the purpose was to elicit a confession as evidence that he lied on his immigration documents and to extract Boskic's information about what happened and who else was involved in the Srebrenica massacres. As the First Circuit explained in Babb, 807 F.2d at 279:

> Even if we assume, for purposes of Babb's contentions, that the prosecutor purposely attempted to mislead Babb, the obvious reason for such misrepresentations would have been to induce Babb to waive his fifth amendment privilege and to give helpful testimony to the grand jury. As we discussed above, Babb was not misled in

> this manner. In fact, it defies logic to argue that assurances that might have lulled a witness into giving incriminating statements had the effect of inducing the witness to commit perjury. Consequently, we find that Babb has failed to establish the necessary nexus between the alleged misconduct and his subsequent perjurious testimony in order to support a claim of fundamental unfairness.

See also United States v. Gonzales, 620 F.Supp. 1143, 1148-49 (N.D.Ill.1985).[14]

As in Babb,"the record [does not] support[ ] an inference that [Boskic]'s reliance on the misrepresentations make[s] any subsequent proceedings against him fundamentally unfair," Babb, 807 F.2d at 278-79, and I decline to suppress the allegedly perjurious statements or dismiss the fifth count.

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[14] "It was not inconceivable that, under oath for the first time, defendant would testify as the government apparently believed the truth to be, and its case would be certain. If in fact he lied under oath, as the government charges, he cannot be insulated from a perjury charge solely because he said what the government anticipated he probably would say. Defendant had non-coercive options and he was fully warned. If he, an attorney, chose to lie, that was his decision, and the government can compel him to answer for the consequences." United States v. Gonzales, 620 F.Supp. 1143, 1148-49 (N.D.Ill.1985).

III. CONCLUSION

As the Supreme Court recognized in Miranda, "confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478. I find the statements at issue here to be voluntary. Consequently, for the reasons set forth more fully above, I DENY Boskic's motion to suppress and I DENY Boskic's motion to dismiss.